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REPORTS

OF

513

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA

DURING THE

DECEMBER TERMS, 1881-82.

BY

JNO. P. TILLMAN,

SPECIAL REPORTER.

40631

VOL. LXXI.

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OFFICERS OF THE COURT .
DURING THE TIME OF THESE DECISIONS.

ROBERT C. BRICKELL, CHIEF JUSTICE, *Huntsville, Ala.*

GEORGE W. STONE, ASSOCIATE JUSTICE, *Montgomery, Ala.*

H. M. SOMERVILLE, ASSOCIATE JUSTICE, *Tuskaloosa, Ala.*

H. C. TOMPKINS, ATTORNEY GENERAL, *Montgomery, Ala.*

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FRANCIS L. PETTUS, PRIVATE SECRETARY, *Selma, Ala.*

RULES OF PRACTICE.

Rule of Practice providing for an Abridgment of Record on Appeal, by Agreement.

When an appeal is taken to the Supreme Court from any of the courts of record in this State, the parties, their solicitors or attorneys may make an agreement in writing, specifying what part of the proceedings shall be inserted in the transcript; and it shall be the duty of registers, clerks, and judges of probate, when such agreement is filed, to include in the transcript only such part of the proceedings as shall be specified in such agreement; and the agreement itself shall be made a part of the transcript.

Adopted, April 25, 1878.

Rule of Practice for establishing Bills of Exceptions in the Supreme Court.

When it is proposed to establish a bill of exceptions under section 3111 of the Code of 1876, the testimony for and against such motion must be taken and certified under the following regulations: The opposing parties may agree in writing on one or more commissioners; or any competent justice of the peace, or other judicial officer, at the option of the party desiring to take testimony, may act as commissioner, with authority in either case to administer oaths to witnesses, and to take, reduce to writing and certify the testimony. The party desiring to examine a witness or witnesses under this rule, shall cause reasonable notice in writing to be served on adverse counsel, in no case to be less than five days, giving notice of time and place of examination, and of the witnesses proposed to be examined. Such notice, with the service thereon, shall be made part of the deposition, unless the commissioner certifies that the adversary party, by himself or counsel, was present at the examination. In taking such testimony no commission or written interrogatories shall be necessary; but interrogatories, cross interrogatories and rebutting interrogatories may be allowed; and the whole must be taken and certified, pursuing substantially the rules and forms required in the matter of depositions in chancery. Testimony thus taken must be sealed up, directed and forwarded to the clerk of this court, with a memorandum on the envelope as follows: Deposition in case of _____ vs. _____, pending in Supreme Court; and the commissioner must sign his name thereto as commissioner.

Adopted, February 8th, 1884.

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CASES

IN THE

SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1881.

King v. The State.

Indictment for Murder.

1. *Charge of the court; when not erroneous.*—Where counsel, in the argument of the cause, urged upon the jury, that there was a conflict between the evidence of a named witness and that of the other witnesses in the cause,—*held*, that the court committed no error in referring to the argument in its charge to the jury, and in submitting for their consideration and determination, whether there was such conflict, and in referring to them the credibility of the witnesses, if such conflict did exist.

2. *When charge does not invade province of the jury.*—Upon exception to a sentence in the general charge of the court, wholly disconnected from the body of the charge, which is in these words: "Do you thus believe then that in this county and before the finding of the indictment in this case, the defendant killed John T. Franklin [the deceased]? If so, then inquire, as I have stated, from the evidence, what the circumstances of the killing were, what was the situation of the parties to each other,"—*held*, that there was no invasion of the province of the jury—no assumption that any fact was proved, nor the withdrawal from the consideration of the jury of evidence tending to establish any fact.

3. *When charge is abstract.*—On the trial of a defendant indicted for murder, if there is no evidence tending to show that the killing was unintentional, though unlawful, a charge requested by the defendant instructing the jury, that the defendant might be found guilty of manslaughter in the second degree, although guiltless of a higher offense, is abstract and should be refused.

4. *Same.*—In the absence of all evidence in such case having a tendency to show that at the time of the killing the defendant was in imminent peril of life or grievous bodily harm, or of the existence of circumstances creating in his mind a reasonable belief of such peril, a charge requested by the defendant embodying instructions on the law of self-defense, is abstract, and should be refused.

APPEAL from Coosa Circuit Court.
Tried before Hon. JAMES E. COBB.

[King v. The State.]

The indictment in this cause charged the defendant with the murder of John T. Franklin; and he was convicted of manslaughter in the first degree. The evidence for the State tended to show, that in November, 1879, the defendant and the deceased went into a certain store in Rockford, in Coosa county, about the same time, and there had a conversation, in which the defendant said that the deceased had been saying something about him; that after talking for a minute or so, they left the store together, but in about half an hour they returned together, when the defendant asked the proprietor of the store, whether the deceased had said "a certain thing about him," to which the proprietor replied in the affirmative; that King then turned to the deceased and demanded a retraction; that after this the State's witnesses did not see what was done by either of the parties, until their attention was attracted by a noise, when they saw the defendant strike the deceased several blows with an ordinary walking stick; that the deceased was doing nothing to, nor was he making any demonstrations towards the defendant; that two men then caught hold of the defendant and pulled him towards and near to the front door; that "King struggled to get away, saying 'let me go,' and in a moment or two he did get away, having drawn and opened a common pocket-knife during his struggles, and as soon as he got loose he went to Franklin, who, staggering, had advanced" towards a door on the side of the store leading into a bar-room, from the rear end of the room where the blows with the stick were stricken, "and there King cut him twice with the knife, one cut in the side, and the other in the shoulder, Franklin not resisting, and he fell and in a few minutes died;" and that the death of the deceased was caused by the cut in the side. The evidence for the State also proved that within a short time before the killing the defendant had threatened to kill the deceased; but that afterwards and about five minutes before the killing, "they made friends," took a drink together in a bar-room, and left the bar-room together "perfectly friendly." The testimony for the defendant tended to show that just before he struck the deceased, the latter said "in response to several demands from" King, the defendant, "I am the man that said it, and I will say it again," and that he repeated this, and, as he did so, he put his right hand in his pants' pocket and stepped back with his right foot, and then the defendant struck him; that the deceased came to the side-door leading into the bar-room, and asked a man who was standing in the door, for a pistol twice; that defendant was then near the front-door, not more than ten feet from the deceased, and he "at that moment" got loose and advanced to the deceased and "did the cutting;" that the defendant had twice that day asked the de-

[King v. The State.]

ceased to go away and let him alone; and that the deceased, within three months preceding the killing, made frequent threats to kill the defendant, some of which had been communicated to him. "King and Franklin were both drinking—Franklin being more intoxicated than King."

The bill of exceptions does not purport to set out all the evidence, but after a statement of what the evidence tended to prove, the substance of which is given above, the bill of exceptions proceeds: "And thereupon the court, being requested by the defendant to charge the jury in writing before the argument of counsel began, charged as follows: 'But is there any material conflict in the statements of the several witnesses? It is said that the witness Sims [who seems to have been examined as a witness for the defendant] stated facts not testified to by other witnesses, and that the facts so stated by Sims makes a different situation than is made by the testimony of the other witnesses. Is this true? Is there or not anything in the statements of Sims which is in material conflict with other witnesses? If there is, and if you are led to believe his statements rather than those of the other witnesses, you will inquire whether or not his evidence is sufficient to so place the defendant and the deceased, that the defendant, as a reasonable and prudent man, had any cause to apprehend danger.' To which the defendant duly excepted. 'Do you thus believe then, that in this county, and before the finding of the indictment in this case, the defendant killed John T. Franklin? If so, then inquire, as I have stated, from the evidence, what the circumstances of the killing were, what was the situation of the parties to each other.' To which the defendant duly excepted." The defendant then asked the court in writing to give six charges to the jury, but the court refused each of these charges, and the defendant separately excepted. The first charge so requested is in these words: "Under this indictment the defendant may be found guilty of manslaughter in the second degree, even though he may be guiltless of a higher offense; and if you should find him guilty thereof, you will so say by your verdict, and punish him by confinement in jail or hard labor for the county not more than one year, and by a fine not exceeding five hundred dollars." The other charges so requested relate to the law of self-defense.

The rulings of the Circuit Court above noted are here assigned as error.

PARSONS & PARSONS, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

[King v. The State.]

BRICKELL, C. J.—The general charge of the court, on the request of the defendant, was given in writing. An exception to two sentences of the charge was taken. These, wholly disconnected from the body of the charge, are now presented for review, without a statement of all, or the substance of all the evidence which was before the jury. The objection urged in support of the first exception is, that the court assumed the only conflict in the evidence was between Sims' testimony and that of the other witnesses. This is not the proper construction of the charge, or sentence of it, recited in the bill of exceptions. The court referred to the argument of counsel, manifestly, in which it had been urged there was a conflict between the evidence of Sims and the other witnesses, and submitted for the consideration and determination of the jury, whether there was such conflict, and, if it existed, refers to them the credibility of the witnesses. This was within the line of the duty of the court.

The second sentence of the charge is not offensive to the objection taken to it. There is no invasion of the province of the jury—no assumption that any fact was proved, nor the withdrawal from the consideration of the jury of evidence tending to establish any fact.

If there had been any evidence tending to show that the killing was unintentional, though unlawful, the first instruction requested could have been given properly. The evidence showing that the killing was voluntary and intentional, the instruction was abstract, and properly refused. So, if there was any evidence, however slight, tending to support the hypothesis on which the other instructions requested are founded, it may be they should have been given. But in the absence of all evidence having a tendency to show that at the time of the killing the accused was in imminent peril of life, or grievous bodily harm, or of the existence of circumstances creating in his mind a reasonable belief of such peril, leaving out of view that he appears to have provoked the difficulty, these instructions were abstract. The court never errs in refusing instructions which are abstract. If given, the only effect following them would be to mislead the jury, unless additional and explanatory instructions were given.

Affirmed.

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[Allen v. The State.]

Allen v. The State.

Indictment for Grand Larceny.

1. *Oath of petit jury in criminal case ; when insufficient.*—An oath administered to a petit jury in a criminal case to “well and truly the issue joined to try and a true verdict to render,” is insufficient, in that it fails to require the jury to render their verdict “according to the evidence ;” and it will not sustain a judgment of conviction on appeal.

2. *Declaration of defendant ; when inadmissible.*—It is not competent for a defendant indicted for larceny and who defends under a claim of ownership, to introduce in evidence a declaration made by him while in possession of the property alleged to have been stolen, showing how his asserted right or claim originated. Such declaration is no part of the *res gestæ*, but merely a recital of a past transaction.

APPEAL from Hale Circuit Court.

Tried before Hon. JOHN MOORE.

At the fall term, 1881, of said court, the defendant was indicted for grand larceny, the property alleged to have been stolen being a heifer, “an animal of the cow kind,” the property of one Lavender ; and, at a subsequent term, he was tried on the plea of not guilty, and was convicted.

The evidence set out in the bill of exceptions discloses substantially the following facts : In the fall of 1879, Lavender employed the defendant and his family as laborers on his farm for the balance of that year and for the year 1880, and they thereupon moved to his place. At this time the defendant owned a cow and heifer which were under mortgage. Lavender paid off the mortgage debt and took possession of the cow and heifer under an agreement with the defendant that the latter should have the privilege of buying them back, on his paying Lavender what he had paid on the mortgage debt, and a further sum of \$100, which he had also paid for the defendant at the latter’s request. The evidence does not show that the defendant ever paid or offered to pay to Lavender these sums of money. During the year 1880, the defendant moved his family off of Lavender’s place, and about two months thereafter he also left the place. Shortly after the defendant left, he took the heifer out of Lavender’s pasture without his consent or knowledge, and carried it three or four miles to a place owned by one Hill, where the defendant’s brother lived, and turned it into a pasture with other stock owned by Hill and his tenants, where Lavender shortly afterwards found it, and took

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possession of it. It was also shown, on cross-examination of the defendant's brother, who was a witness for the State, that the defendant carried the heifer to Hill's place and there put it in the pasture in the day-time; that the pasture was about a quarter of a mile from the public road; that there was no concealment of the heifer while it was on the Hill place; and that the defendant claimed the heifer as his own at the time he brought it to said place. The defendant thereupon asked the witness to state all that the defendant then said to him as to his right or claim to the heifer, and how it was that he claimed it. To this question the State objected, the objection was sustained, and the defendant excepted. It was admitted that, at the time the defendant made the statement intended to be brought out by said question he had not been arrested, and no proceedings had been commenced against him for stealing the heifer.

The entry of the judgment of conviction purports to set out the oath that was administered to the petit jury which tried the cause. This entry shows that the jury were sworn "well and truly the issue joined to try, and a true verdict to render."

The oath administered to the jury, and the ruling of the court on the evidence, above noted, are here assigned as error.

COLEMAN & ROULHAC, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

STONE, J.—In determining the oath to be administered to the petit jury for the trial of criminal cases, our rulings have not been uniform. All the decisions hold that if the recital be that the jury were "duly sworn," or "sworn according to law," this is sufficient. This is a very simple rule, and it would be well if it were universally adopted. But when the judgment-entry purports to set out the oath that was administered, our rulings are not reconcilable. Many of our decisions in cases of this kind have asserted the principle, that when the judgment-entry assumes to set out the oath administered, it must express every material ingredient which the statute prescribes. Code of 1876, § 4765. Our later utterances have affirmed this to be the rule, and we will adhere to it.—Clark's Criminal Digest, § 574; *Commander v. The State*, 60 Ala. 1; *Roberts v. The State*, 68 Ala. 515. The oath administered in this case fails to require the jury to render their verdict "according to the evidence," and for that omission the judgment of conviction must be reversed.

The evidence objected to and ruled out, was no part of the
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res gestæ. A natural and proper answer to the question would have been a statement, showing how the defendant's asserted right or claim originated. This would have been evidence of a past transaction, and not admissible.—*Nelson v. Iverson*, 17 Ala. 216; *Spivey v. The State*, 26 Ala. 90; *Cooper v. The State*, 63 Ala. 80.

Reversed and remanded. Let the defendant remain in custody until discharged by due course of law.

Goree v. The State.

Indictment for Public Profane Swearing.

1. *Public profane swearing indictable at common law.*—Public profane swearing, when it takes such form, and is uttered under such circumstances as to constitute a public nuisance, is an indictable offense under the common law; but the single utterance of a profane word is not *per se* indictable, at least when not spoken in a loud voice, or with repetitions.

2. *Same.*—It is not necessary to make out the offense of public profane swearing, that the language used should be heard by a large portion of the community; but it is sufficient, if three or four persons were present and heard the words uttered.

3. *Same; sufficiency of indictment.*—Public profane swearing being a common law offense, and no form of indictment being prescribed by the Code, the indictment must aver every material constituent of the offense, time and venue alone being excepted.

4. *Same; when indictment insufficient.*—An indictment for such offense which fails to charge that the profane words were uttered in the presence or hearing of any one, but merely that they were *publicly* uttered, is insufficient. "According to the best approved precedents, the language is usually charged as having been uttered in the presence and hearing of divers persons, citizens or subjects, as the case may be."

APPEAL from Choctaw Circuit Court.

Tried before Hon. HARRY T. TOULMIN.

The defendant was indicted at the spring term, 1881, of said court for public profane swearing, and was at the succeeding term tried and convicted. The indictment is set out in the opinion. On the trial, had upon the plea of not guilty, the evidence tended to show that the defendant used the profane language averred in the indictment within a few yards of a public road and near a church, a short while after services had been had at the church, and after the congregation had dispersed; that he repeated the profane language several times "in a conversational tone," and that no one was present and heard the language except four named persons. The court in its general charge, after defining profane swearing, instructed

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the jury, that "if such profane swearing was used in the presence of a number of persons, three or more, then and there assembled, it would be public profanity." To this portion of the charge the defendant excepted. The defendant asked the court in writing to charge the jury, "that before they can find the defendant guilty, they must believe from the evidence that the act charged was committed before a large portion of the people in the community in which the act was done." This charge the court refused to give, and the defendant excepted.

W. F. GLOVER, for appellant.—(1) We derive our common law from that of England, which consists of rules of civil conduct based on immemorial usage, and acts of Parliament in force at the time of the settlement of this country by our ancestors, so far as they are applicable to our institutions and condition.—19 Ala. 814; 29 Ala. 478. The statute of 19 Geo. II., c. 21, cited by Blackstone (vol. 4, p. 60), which makes criminal the mere act of using profane language, can, therefore, have no binding force in this country. (2) "To make the offense indictable, it must be such as to shock and insult, not an individual, but the community; to indulge publicly in profane swearing, or in loud and obscene language, so as to draw together a crowd in a thoroughfare, though the offense be not laid as a nuisance.—Wharton's Amer. Cr. Law (4th Ed.), § 6. —See, also, *Ib.* §§ 2400, 2401; *State v. Jones*, 9 Ir. 38.

H. C. TOMPKINS, Attorney-General, for the State.—(1) The indictment in this case is for public profane swearing. This is an offense at common law, and one of that class which is recognized by our laws.—Code of 1876, § 4447; 1 Bish. on Cr. Law (Ed. of 1856), § 378; 1 Whar. Am. Cr. Law, § 6; *The State v. Graham*, 3 Sneed, 134; *Bell v. The State*, 1 Swan, 42; *The State v. Appling*, 25 Mo. 315. (2) The indictment is a substantial and concise statement of the offense as known to the common law.—2 Bish. on Cr. Proc. § 123; Code of 1876, 4785; *Barker v. Commonwealth*, 19 Penn. St. 412. (3) The swearing was in a public place, and four persons besides the defendant were present. This was sufficient. —*Commonwealth v. Foley*, 99 Mass. 497; *Commonwealth v. Oaks*, 113 *Ib.* 8; *Commonwealth v. Harris*, 101 *Ib.* 29.

SOMERVILLE, J.—The indictment in this case charges, "that, before the finding of this indictment, Joe Goree [the appellant] did indulge publicly in profane swearing by using such expressions as, to-wit [here setting out certain profane language], or words of like import, to the evil example of all

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others in like case offending, and against the peace and dignity of the State of Alabama." The defendant was convicted of the offense charged, and being fined in the sum of twenty-five dollars, was duly sentenced in accordance with the verdict of the jury.

It is too well settled, for either disputation or discussion, that public profane swearing, as well as blasphemy, was an indictable offense at the common law, owing, no doubt, as well to the fact of its tendency to disturb the peace and corrupt the morals of the community, as to undermine the foundations of Christianity, which is justly regarded, in a certain sense, as a part of the common law of the land.—1 Bish. Cr. Law, § 498; 3 Whart. Amer. Cr. Law, §§ 2536–37; *State v. Graham*, 3 Sneed (Tenn.), 134; *State v. Ellar*, 1 Dev. (N. C.), 267.

The sounder view, however, seems to be that a single utterance of a profane word is not *per se* indictable, if it be not spoken, at least, with a loud voice, nor with repetitions. To be indictable, it is requisite that profanity should take such form, and be uttered under such circumstances as to constitute a public nuisance.—2 Bish. Cr. Law, § 79; *State v. Waller*, 3 Murphy (N. C.), 229; *State v. Jones*, 9 Ired. (N. C.), 38.

The present indictment is fatally defective in its allegations. It fails to charge that the act was done in the *presence* or *hearing* of any one. The averment that it was done "publicly" is insufficient, for such may have been true if the act was done openly, or without concealment, and in a public place. In the case of *The State v. Pepper*, 68 N. C. 259, an indictment for profane swearing was held defective, in this particular, although it charged the act as having been done in the *public streets* of a town. According to the best approved precedents, the language is usually charged as having been uttered "in the *presence* and *hearing* of *divers*" persons, citizens or subjects, as the case may be.—2 Bish. Cr. Proc. § 123; 2 Whart. Precedents, 962–967; *State v. Appling*, 25 Mo. 315.

Nor is this defect obviated by the provisions of our statutes in reference to the contents of indictments.—Code, §§ 4785, 4793. The offense charged is not a statutory but a common law crime. There is no prescribed form for it in the Code, and the principle obtains in such cases, that the indictment must aver every material constituent of the offense charged, *time and venue alone being excepted*.—*Smith v. State*, 63 Ala. 55; *Noles v. State*, 24 Ala. 672.

It certainly is not required for the completeness of an offense of this nature, that the language used, as insisted by appellant's counsel, should have been heard by a large portion of the people in the community." The court very properly ruled

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that if three or four persons were present and heard the words uttered, this would be sufficient.

The judgment of the Circuit Court is, for the above reason, reversed, and the cause is remanded. And, in the meanwhile, the defendant will be retained in custody until discharged by due course of law.

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Indictment for Trading in Farm Products between Sunset and Sunrise.

1. *Finding of facts by County Court of Hale; effect of on appeal.*—When a criminal case is tried in the County Court of Hale county, without the intervention of a jury, under the statute, this court will not revise the findings of fact by the judge trying the case, and reverse the judgment of that court thereon, unless it is plainly erroneous.

2. *Trading in farm products between sunset and sunrise; § 4369 of the Code construed.*—Under the statute prohibiting the selling, buying, etc., of the agricultural products therein designated after the hour of sunset and before the hour of sunrise of the next succeeding day (Code, § 4369), the want of the knowledge or consent of the owner of the products so prohibited to be bought, sold, etc., is not an element of the offense; and hence, his knowledge of the act, or consent thereto, when done by another, is no defense to a prosecution under the statute.

APPEAL from Hale County Court.

Tried before Hon. JAMES M. HOBSON.

The defendant was indicted at the spring term, 1881, of the Circuit Court of Hale county, for buying or receiving “a half bushel of corn of the value of fifty cents from Stephen Jones after the hour of sunset and before the hour of sunrise of the next succeeding day;” and the indictment was transferred to the County Court under the statute, where the cause was tried before the judge of said court without a jury, and the defendant was found guilty and sentenced to pay a fine of ten dollars and the costs of the prosecution; and from the judgment he appealed to this court, having reserved a bill of exceptions on the trial of the cause. The case made by the record is sufficiently stated in the opinion.

THOS. R. ROULHAC, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

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BRICKELL, C. J.—We can not discover that the record presents any other question than the sufficiency of the evidence to authorize the conviction of the appellant. There may be some conflict in the evidence; parts of it tending to establish guilt, and parts tending to establish innocence. We can not revise the findings of fact by the judge of the county court, and reverse the judgment, unless it is plainly erroneous.—*Summers v. State*, 70 Ala. 16; *Cawthorn v. State*, 63 Ala. 157.

It is shown, the corn was delivered to the defendant, with the knowledge and consent of Walton, the owner. The want of his knowledge or consent is not an element of the offense with which the defendant is charged. It is the dealing or trading in the agricultural products mentioned, within the specified hours, the statute pronounces a misdemeanor.—Code of 1876, § 4369. If the owner of the products engage in such dealing, by selling, bartering, or otherwise disposing of them in the course of trade, within the prohibited hours, he is guilty of a misdemeanor, of the same kind and degree, and subject to the same punishment, as the person who buys and receives them. That the corn was disposed of with the consent of the owner, did not render the act of the defendant, in buying, or receiving it, inoffensive to the statute.

There was also evidence having a tendency to show that the defendant did not buy, or barter for the corn, and that he merely suffered it to be left in his house. There was also evidence tending to show a purchase by the defendant. The County Court had the witnesses before it, and gave credit to the evidence of a sale. We can not say it erred in the finding.

Affirmed.

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Indictment for Gaming.

1. *Charge requested by defendant; when properly refused.*—On the trial of a defendant under an indictment for gaming, containing one count, in which several averments are stated disjunctively, a charge requested by the defendant, instructing the jury, that “the testimony of the witness must be such as to establish the fact to a moral certainty, and beyond all reasonable doubt, that every allegation in the indictment is true,” should not be given, although it asserts a legal truism, for the reason that its effect would be to refer it to the jury to ascertain what were the allegations in the indictment.

2. *When judgment in criminal case will not support an appeal.*—Where, on the trial of a misdemeanor, the judgment-entry recites a verdict

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guilty and the amount of the fine assessed against the defendant by the jury, but fails to show that the court pronounced judgment on the verdict, an appeal will not lie to this court, although the entry contains a judgment confessed by the defendant and his sureties for the fine and costs.

APPEAL from Etowah Circuit Court.

Tried before Hon. LE ROY F. BOX.

The indictment in this cause was found at the fall term, 1879, of said court, and contains one count, in which it is charged that before the finding of the indictment, the defendant "bet or hazarded money, to-wit: lawful currency of the United States of America, of a value and denomination to said jurors unknown, or other thing of value, to-wit: poker chips of the value of one cent, at a game played with cards or dice, or some device or substitute for cards or dice, at a tavern, inn or place where spirituous liquors were at the time sold, retailed or given away, or in a public house, highway, or some other public place, or at an out-house where people resort, against the peace and dignity of the State of Alabama." On the trial several questions were propounded by the solicitor to the State's witness, to which the defendant objected, and his objections having been overruled, he duly excepted; but as it is not shown by the bill of exceptions that these questions were answered by the witness, they are omitted from this report. "In answer to a question asked by the solicitor the witness said that the chips [used in a game of cards] may have been worth something." To this answer the defendant objected, and moved to have it excluded from the jury; but his motion was overruled, and he excepted. The jury returned a verdict of guilty, and assessed a fine of fifty dollars. The judgment-entry, after reciting the trial and verdict, proceeds as follows: "And thereupon the defendant, with Reese Gramlin and John M. Sanson as his sureties, in open court confessed judgment in favor of the State of Alabama for said fine of fifty dollars and costs of this prosecution. It is therefore considered by the court that the State of Alabama, for the use of Etowah county, have and recover judgment against the said David Ayers, Reese Gramlin and John M. Sanson for the said fine of fifty dollars and costs of prosecution by them so confessed," etc. Then follows an order suspending execution pending this appeal, on defendant giving bond as required by law. The other facts are stated in the opinion.

(Name of appellant's counsel not shown by the record.)

H. C. TOMPKINS, Attorney-General, for the State.

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STONE, J.—The defendant asked the court in writing to charge the jury that “the testimony of the witness must be such as to establish the fact to a moral certainty, and beyond all reasonable doubt, that every allegation in the indictment is true.” Only one witness had given criminating evidence. The charge, as asked, asserted a legal truism, yet it should not have been given. This, if for no other reason, because the effect of it would have been to refer it to the jury to ascertain what were the allegations in the indictment. Average juries are poorly qualified to construe pleadings—particularly such pleadings as our Code prescribes. Many indictments under our system may and do contain charges and averments stated disjunctively. The indictment in the present case is one of that class. It charges that the thing bet was one of two classes—that the game played was with cards, dice, or some substitute for cards or dice, and that the game was played at either one or another of some eight named places. All these elemental ingredients of the offense are described either by name, or with few words, and the average non-professional mind would be incapable of comprehending their import. Hence it is, that the law does not authorize the reference to juries of the interpretation of writings. The charge was rightly refused. It is for the court to instruct the jury what *facts* are necessary to be proved, and for them to find, to justify them in rendering a verdict of guilty.

We find no error in the various rulings of the Circuit Court on the admissibility of testimony.

The jury in this case rendered a verdict of guilty, and assessed the fine, but there was no judgment of the court pronounced on that verdict. Appeals lie, not from verdicts, but from judgments rendered. True, there was a judgment confessed for fine and costs, but the appeal is not from that judgment. Errors can not be assigned on confessed judgments. If they could, the contention in the present case would be, not that there was error in finding Ayers guilty, but in rendering judgment against him and his sureties in the confessed judgment. There should have been a judgment of the court pronounced on the verdict of guilty, before there could be an appeal to this court.

There being no judgment of conviction in this case, the appeal must be dismissed.

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Indictment for Grand Larceny.

1. *Larceny; what constitutes asportation.*—Where, on the trial of a defendant indicted for the larceny of a hog, the only evidence of an asportation tended to prove that the defendant shot the hog, and cut its throat, these injuries resulting in death, a charge instructing the jury, that the “least removal of the hog by the defendant after he shot and killed it, would be an *asportavit* in law; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed the hog, and then took hold of it and cut its throat, that would constitute a taking and carrying away in the eyes of the law,” is free from error.

2. *Hard labor for costs; when sentence sufficient.*—Where the record does not show that the bill of costs includes any costs, for the payment of which the defendant can not be legally imprisoned, a judgment of conviction, specifying the exact duration of the additional hard labor imposed for costs, is sufficient.

APPEAL from Marengo Circuit Court.

Tried before Hon. WILLIAM E. CLARKE.

The judgment in reference to the costs in this case is in these words: “It is also ordered that the prisoner be and he is hereby sentenced to additional hard labor for Marengo county for one hundred and sixty-nine days, the time required by law to work out the costs of this prosecution at forty cents per day.” The record fails to show the items of costs. The other facts are sufficiently stated in the opinion.

EUGENE McCAA, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The defendant is indicted for the larceny of a hog. The only evidence of an *asportation* is that tending to prove that he shot the animal and cut its throat, these injuries resulting in death. The court charged the jury, that “the least removal of the hog by the defendant, after he shot and killed it, would be an *asportavit* in law; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed the hog, and then took hold of it and cut its throat, that would constitute a taking and carrying away in the eyes of the law.”

This charge we think was correct, on the authority of *Edmonds v. The State*, 70 Ala. 8. “The controlling
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principle in such cases," we there said, "would seem to be, that the possession of the owner must be so far changed as that *the dominion of the trespasser shall be complete*. His proximity to the intended booty must be such as to enable him to assert his dominion by taking actual control or custody by manucaption, if he so wills. If he abandons the enterprise, however, before being placed in this attitude, he is not guilty of the offense of larceny, though he may be convicted of an attempt to commit it." The defendant very obviously may have been found guilty under the proper application of this principle.

The judgment of the court specified the exact duration of the additional hard labor imposed for costs, and this was sufficient.—*Coleman v. The State*, 55 Ala. 173. The record does not show that the bill of costs includes any for the payment of which the defendant can not be legally imprisoned within the principle settled by *Bradley's* case, 69 Ala. 318.

Affirmed.

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Prosecutions for Gaming.

1. *When ruling of lower court presumed to be correct on appeal.*—Where the record shows in a criminal case, that an unusual number of witnesses were summoned, but fails to show for what purpose, or at whose instance, this court can not judicially know what or how many controversies of fact were raised on the trial, and hence, can not know that witnesses were summoned in excess of what the statute requires. In such case, in the absence of a showing to the contrary, this court will indulge the presumption that the officers of the law did their duty, and that the lower court rightly overruled defendant's motion to re-tax the costs.

2. *Solicitor's fees in County Court of Madison county.*—For all convictions for misdemeanors in the County Court of Madison county, whether commenced by affidavit and warrant in that court, or by indictment found in the Circuit Court and transferred to that court, the solicitor is entitled, under the act, entitled "An act to regulate the trial of misdemeanors in Madison county," approved February 9th, 1877 (Pamphlet Acts, 1876-7, p. 149), to the same fees as for similar services in the Circuit Court.

APPEALS from Madison County Court.

Tried before Hon. WILLIAM RICHARDSON.

These were prosecutions for gaming, commenced and tried in said court. The questions reserved for the consideration of this court are the same in each case, and were raised on motions

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to re-tax the costs. These motions were denied by the lower court, and, on appeal, both cases were argued and submitted together.

DANIEL COLEMAN, for appellants.

H. C. TOMPKINS, Attorney-General, for the State.

STONE, J.—An unusual number of witnesses appear to have been summoned in these causes, but we are not informed for what purpose or purposes they were summoned, nor at the instance of which party. We can not judicially know what, nor how many controversies of fact were raised, and hence can not know that section 3144 of the Code of 1876 was violated, nor that any of the witnesses were summoned in excess of what the statute authorizes. In the absence of a showing to the contrary, we must indulge the presumption that the officers of the law did their duty, and we presume the County Court rightly overruled the motion to re-tax, unless the record affirmatively shows the contrary.

There is taxed in each bill of costs a solicitor's fee of sixty dollars, and the appellant moved below, and here renews the motion, to strike the item out, as improperly charged. The contention is, that in misdemeanors tried on warrant of arrest without indictment, the statute has made no provision for a fee to the solicitor.

In *Cawthorn v. The State*, 63 Ala. 157, we had under consideration the statute which must determine the question we are now considering.—Pamph. Acts 1876–7, p. 149. We then ruled that in all essential matters of trial, appeal, etc., that statute intended to make no distinction in the trial of misdemeanors in the County Court of Madison, between cases originating in that court, and cases transferred to it from the Circuit Court. We deem it unnecessary to re-state the argument here. The eighth section of that statute makes it “the duty of the solicitor of the judicial circuit of said county to attend said court, either in person or by deputy, and prosecute for the State all causes therein,” and declares that “for so doing, he shall receive the same fees as for similar services in the Circuit Court.” This certainly embraces all misdemeanors tried therein, whether commenced by affidavit, and warrant returnable thereto, or by indictment found in the Circuit Court, and transferred to the County Court. The solicitor's fee for prosecuting under sections 4209 and 4210 of the Code of 1876, is sixty dollars for each conviction.—Code, § 5047.

Affirmed.

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Indictment for Murder.

1. *When record must show presence of defendant in capital case.*—On appeal in a capital case, the failure of the record to show affirmatively, that the defendant was personally present in court when the day for his trial was fixed, and the order made for summoning a special *venire*, is a reversible error.

2. *When defendant's presence will not be presumed, or error waived.* In such case this court will not presume from the mere silence of the record, that the defendant was present when the day for his trial was fixed, and the order made for summoning a special *venire*; nor will it be held that the error was waived by his proceeding to trial without objection.

3. *Practice in excusing jurors summoned to try a capital case.*—"Without deciding it to be error to excuse a juror from service before a capital felony is regularly called for trial, when he is shown to be exempt by statute," the court expresses the opinion, "that the safer practice is not to excuse any juror in advance of the trial, until he claims the privilege of such exemption on his name being regularly drawn."

4. *When evidence irrelevant and inadmissible.*—The guilt or innocence of a defendant in a criminal case can not be, in any manner, affected by *ex parte* statements made in his absence, whether they be inculpatory or exculpatory; and hence, on the trial of a defendant charged with murder, the fact, that, on an inquest held over the body of the deceased, no charge was made against the defendant, and no evidence was introduced, implicating or tending to implicate him in the killing, is irrelevant and should be excluded from the jury, when it is not shown that any of the witnesses for the State were examined before the coroner, and their testimony could not thereby be impeached.

5. *Testimony taken before coroner; when inadmissible on trial for murder.* The written statement of the testimony of a witness examined before a coroner, and by him reduced to writing, on an inquest held by him over the body of the deceased, is not competent evidence for a defendant on trial for murder, on proof that the witness had removed from the State.

6. *Person convicted of infamous crime incompetent as a witness.*—At common law persons convicted of crime which rendered them infamous, such as treason, felony and *crimen falsi*, were incompetent to testify as witnesses; and, in the absence of statutory provisions changing the common law, that rule prevails in this State.

7. *Same; conviction of petit larceny renders witness incompetent.*—A conviction of petit larceny renders a witness infamous, and, therefore, incompetent to testify.

8. *When declarations made in presence of deceased incompetent.*—Where, on the trial of a defendant indicted for murder, it was shown that the deceased came to his death from a cut or stab made at night with a knife or some other sharp instrument, the fact that one who was present at the scene of the crime, but who was not examined, told a witness, a short time after the wound was inflicted, in the presence of the deceased, that he did not know who struck the deceased, that it was too dark to recognize any one, and that the deceased heard the statement and made no reply, is not competent evidence for the defendant, although no eye-witness to the transaction was examined, and the State relied in

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part on dying declarations of the deceased, subsequently made, to show that the defendant dealt the fatal blow.

9. *Cross-examination of witness; what competent to show on.*—It is competent for the State, on the cross-examination of a witness examined on behalf of a defendant on trial for murder, and who had testified to material facts relating to the commission of the offense, for the purpose of testing his bias or prejudice, to show that the witness had been summoned as a juror on a former trial of the cause, and that he had then stated on his *voir dire*, that he had no fixed opinion as to the defendant's guilt or innocence that would bias his verdict.

10. *Malice implied from use of deadly weapon; character of weapon a question for the jury.*—Malice may be implied from the use of a deadly weapon; and the character of the weapon used, whether deadly or otherwise, is, in most cases, a question for the jury, to be determined from its description by witnesses, the nature of the wound inflicted, the opinion of experts, and other circumstances in evidence.

11. *Charge assuming pocket-knife not a deadly weapon erroneous.*—The refusal of a charge requested by a defendant on trial for murder, which assumes, as matter of law, that a pocket-knife is not a deadly weapon, is free from error.

12. *Dying declarations; theory on which they are admissible in evidence.* Dying declarations are not admissible in evidence merely on the ground, that they are not wilfully or intentionally false; but from the necessity of the case, in order to bring man-slayers to justice, and because, being uttered under a sense of impending death, the solemnity of the occasion is tantamount to the safeguard of an oath.

13. *Same; weight of.*—If such declarations point to the identity of the defendant, as the guilty agent, with the same clearness and certainty as if the deceased had designated him by name, they are entitled to as much weight as if the defendant's name had been expressly mentioned.

14. *Flight of defendant as evidence of guilt.*—The flight of a defendant in a criminal case may or may not be considered as a circumstance tending to prove guilt, depending on the motive which prompted it,—whether a consciousness of guilt and a pending apprehension of being brought to justice caused the flight, or whether it was caused from some other and more innocent motive.

APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

At the November term, 1880, of said court, Nat Sylvester, *alias* Nathaniel Sylvester, the defendant, was indicted for the murder of Jeremiah Lynch; and at a subsequent term he was tried and convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for ten years. It does not appear from the record that the prisoner was present in court, either in person or by attorney, when a day was appointed for his trial, and the order made for summoning the special *venire*; nor does it appear that the defendant made this the ground of objection in the court below. On the day preceding the day set for the trial, on empaneling the regular jurors for the week, one of the jurors, whose name was on the regular panel, and also on the special *venire* summoned to try the defendant, a copy of which had been served on him, claimed and showed to the court, that he was exempt under the statute from jury duty; and he was thereupon excused from service

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on the regular panel, but was told by the sheriff, that he was also on the special *venire*, and that he must return on the day set for the trial. The defendant was not present, either in person or by attorney, when the juror was excused. The juror having failed to attend on the day fixed for the trial, he was fined; but on a subsequent day, on a showing made by him, that he had misunderstood the order of the court and the direction of the sheriff, the fine was remitted.

On the trial it was shown that the deceased, about seven or eight o'clock one night in May, 1872, was wounded on the streets, in the city of Mobile, the wound consisting of a smooth cut or stab in the left breast, about half an inch in length, the depth of which was not known, made by some sharp instrument, it being such a wound as could have been made by an ordinary pocket-knife; that from the effects of the wound he died a few days after it was inflicted, and that he was at the time a policeman of said city. None of the witnesses examined on the trial saw the fatal blow, or the person by whom it was given. The evidence for the State, however, tended to show that the deceased was wounded while he was on duty as a policeman, and while he, with another policeman by the name of Finnegan, was in the act of arresting one of four or five negroes, who were committing a breach of the peace, and among whom was the defendant, a "very black negro;" and that the defendant inflicted the wound. The evidence tending to show that the defendant was the guilty agent, consisted of a confession made by him, of dying declarations made by the deceased, and other evidence circumstantial in its nature. It was also shown that the defendant left the city of Mobile on the day following the night when the deceased was wounded, under circumstances tending to show that he had received information that officers of the law were after him, and that his purpose in leaving was to evade arrest; and that in July, 1879, he was arrested in Pensacola, Florida, where he was known by a different name, and was thence brought to Mobile and there lodged in jail. Several witnesses were examined by the State's solicitor as to declaration made by the deceased after he was wounded. These declarations were made at different times, and "under such circumstances as to fall under the class of dying declarations." They related principally to the person by whom the wound was inflicted. According to the testimony of the several witnesses on this point, to one of them he stated the name of the party who struck him to be Nat Sylvier; to another, that the name was Nat Sylveste; to another, that the name was Nat Sylvester; and to another, that the name was Nat Sylveste or Nat Sylvester. The only declaration made by him touching the circumstances under which he was wounded,

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was, "that some negroes were in a row, and while in the act of arresting one of them, he was stabbed." It was also shown that the defendant, prior to the killing, was known by the name of Nat Sylveste and also by the name of Nat Sylvester. There was also evidence tending to show that at the time the deceased was wounded it was very dark.

That the wound was inflicted, and that Lynch died from its effect, does not seem to have been controverted in the court below. It appears that the line of defense was, (1) that the defendant was not the guilty agent, and that the deceased erred in stating in his dying declarations that he inflicted the fatal wound; and (2) that the blow was stricken in a mutual rencounter. The defendant introduced evidence tending to discredit the witness for the State who testified to a confession by the defendant that he inflicted the blow; also tending to show that at the time the deceased was stabbed pistol-shots at or near the place were heard, and also evidence tending to establish an *alibi*. He examined as a witness one Cain who was the coroner of Mobile county in 1872, and who had, on an inquest held by him over the body of the deceased, examined witnesses and caused their testimony to be reduced to writing. This witness was asked by the defendant, whether any charge was then made against the defendant, but, on objection made by the State to the question, the court refused to allow the witness to answer it, "unless the defendant expected to show that some of the witnesses on this trial testified before the coroner, which had not been done up to this time;" and to this ruling the defendant excepted. The defendant then asked the witness this question: "Was there or not at that time before you any evidence implicating, or tending to implicate Nat Sylvester in the killing of Jerry Lynch." To this question the State objected, the objection was sustained, and the defendant excepted. The witness was then handed a paper, a copy of which is made an exhibit to the bill of exceptions, "which he identified as the testimony of James Finnegan before the coroner's jury at the inquest held over the body of the deceased. The witness then testified that James Finnegan had left Mobile, and witness had not seen or heard of him since the inquest. The State's solicitor here admitted, that a sealed envelop, addressed 'James Finnegan, McGregor's Landing, Iowa,' postmarked as mailed in Mobile, Ala., Aug. 19th, and returned to the writer, Sept. 24th, 1881, contained a letter which was addressed and mailed (as shown by the envelop) by the attorney of the defendant to said Finnegan, according to information given such attorney as to the last residence of said Finnegan by the clerk of the court and the witness Bressingham; and that such letter was forwarded to its destination and returned, because the said

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Finnegan could not be there found." It was also shown that Finnegan left this State a short time after Lynch's death, and had never since been heard of. The defendant then offered to read the testimony of said Finnegan to the jury; but the State objected, the objection was sustained, and the defendant excepted. The defendant "then introduced as a witness one Scott Smith, but the State objected to said Smith being allowed to testify, on the ground that he had been convicted of petit larceny." The defendant admitted that said Smith had been convicted of and sentenced for petit larceny in the City Court of Mobile, but insisted on his competency. The court sustained the objection made by the State, and refused to allow the witness to testify, and the defendant excepted. The defendant also examined as a witness one Sawyer, who testified, in substance, that on the night the deceased was stabbed, he was walking along Royal street, in the city of Mobile, and when he had reached a stated point he heard two pistol-shots fired and stopped, and in a few minutes Jerry Lynch and a man named James Finnegan came up, when Lynch said that he had been stabbed, and asked witness to help him; and that witness then asked Lynch whether he knew the name of the man that stabbed him, and Lynch replied that he did not; that witness then asked Lynch whether he could describe the man, and Lynch said he could, stating that he was a yellow negro; and that witness and Finnegan then accompanied Lynch to the guard-house. The defendant then offered to prove by this witness that he asked Finnegan that night, in the presence of the deceased, whether he knew who stabbed the deceased, and that Finnegan replied that he did not know who stabbed him, that it was too dark for them to recognize any one; and that the deceased heard this statement and did not reply or say any thing. On the objection of the solicitor the court would not allow the defendant to make the offered proof, and he excepted. On cross-examination, the solicitor asked this witness, whether he was not summoned as a juror on a former trial of this case, stating to the court that he expected to show that the witness was summoned as such juror, and that he then swore that he had no fixed opinion that would bias his verdict. To this question the defendant objected, but his objection was overruled, and he excepted. The witness having answered in the affirmative, the solicitor then asked him, what answer he made when the clerk asked him, on the *voir dire*, whether he had a fixed opinion as to the defendant's guilt or innocence that would bias his verdict. To this question the defendant objected, and the court overruled his objection, and he excepted. The witness answered that his reply to the question was, that he did not have "such fixed opinion." Other exceptions were

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reserved by the defendant to the rulings of the lower court on the admissibility of evidence; but, as they are passed on together by this court, without discussion, it is not deemed important to state the facts upon which they are based. The bill of exceptions purports to set out all the evidence

The court, in its general charge, instructed the jury, *inter alia*, that if they "found from the evidence that the wound was made with a deadly weapon, a presumption of malice would arise, unless the evidence in the case negatived the idea of malice." To this portion of the general charge the defendant excepted. The defendant then asked the court in writing to give to the jury the following charges, among others: 20. "If you believe from the evidence that Jeremiah Lynch and another officer went towards a crowd of negroes, and a mutual encounter then ensued, in which one or more shots were fired, and in which the deceased received the fatal blow from the prisoner, and that the wound received by the deceased was a straight smooth cut or stab, not more than a half inch long, and such as a pocket-knife of ordinary size could have made, and of unknown depth; and if the evidence wholly fails to prove to you any other description of the instrument with which the wound was made, or any other details of the stabbing, you can not find the defendant guilty of murder in any degree." 21. "If you believe from the evidence that Jeremiah Lynch and another officer went to arrest a crowd of negroes, and a mutual encounter ensued, in which one or more shots were fired, and in which the deceased received the fatal blow from the prisoner, and that the wound received by the deceased was a straight cut or stab, not more than a half inch long, and such as a pocket-knife of ordinary size could have made, and of unknown depth; and if the evidence wholly fails to prove to you any other description of the instrument with which the wound was made, or any other details of the stabbing, you can not find the prisoner guilty of murder in any degree." 22. "If you believe from the evidence that there was a mutual encounter between some negroes, of whom the defendant was one, on the one side, and the deceased and another officer, on the other side, and that in such encounter the officers, or one of them, shot one or more times at the negroes, and the prisoner stabbed the deceased; and if the evidence wholly fails to prove to you who began such encounter, or who was at fault in it, and also fails to show, whether the shooting was done before the stabbing, or the stabbing was done before the shooting; and fails to show, whether the prisoner could or could not have escaped great and imminent danger to his life, without stabbing the deceased; then you must find the defendant not guilty." 5. "A man's dying declarations are never equivalent to more than the testimony

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of one witness, and there is no rule of law requiring the jury to even give them equal consideration with the testimony of one witness who is upon the stand, and subjected to a cross-examination. They are simply allowed to go to the jury, because of the presumption, that such declarations are not wilfully or intentionally false." These charges the court refused to give, and the defendant separately excepted.

The court, at the request of the solicitor for the State, gave to the jury the following, among other charges, to which the defendant duly excepted, to-wit: 2. "If the jury believe that Jeremiah Lynch, in each of his dying declarations, referred only to the prisoner at the bar, and to no one else, as the man who stabbed him, then they should attach the same weight to those declarations as if the dying man had made mention of the prisoner's entire name at each time that he stated who stabbed him." 3. "That flight may be considered by them, in connection with the other evidence, as a circumstance of guilt; and the jury may also look to the changing of name, and to every other circumstance, as well as to whatever positive evidence that has been presented in the case, to arrive at a conclusion of the defendant's guilt." The solicitor also requested another charge, numbered 1, which need not be set out.

GREGORY L. SMITH, for appellant.

H. C. TOMPKINS, Attorney-General, and FRANCIS B. CLARK, Jr., for the State.

SOMERVILLE, J.—The record in this case fails to show that the defendant was personally present in court when a day was fixed for his trial, and the order was made for summoning the special *venire*. It is insisted by appellant's counsel that this defect is a reversible error. The same point was raised in *Hall v. The State*, 40 Ala. 698, and was there left undecided, the court, however, expressing the opinion with emphasis, "that it is the safer and better course to have the prisoner in court when such orders are made, and that the record should so affirm." In the case of *Spicer v. The State*, 69 Ala. 159, we held, that, in every capital felony, the record must affirmatively show that the court *appointed a day for the trial of the prisoner*, and that the making of such order can not be presumed from the mere silence of the record; nor would the necessity for it be waived by the fact that the prisoner proceeded to trial without objection. It is certainly the undoubted right of every defendant to be present at each stage of a criminal procedure by which his liberty may be affected, or his life be put in jeopardy. And the settled rule seems to be, especially in capital

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cases, that the record must affirmatively show such presence, in the absence of which it would be unsafe for the appellate court to presume it.—1 Bish. Cr. Procedure, § 1180. There are few, if any preliminary proceedings, prior to the verdict, of more importance in criminal trials than legislative details securing the right to have a fair and impartial jury. Of these the most vital, in many cases, often is the order appointing a day for trial and fixing the number of jurors to be summoned. Such an order should never be made in the absence of a defendant, and we must not presume he was present when the record omits to show the fact by positive affirmation. We believe it to be the sounder rule, and the one more in harmony with the past decisions of this court on similar questions, that the defect presented for our consideration is a reversible error, and that the failure of the prisoner to object was no waiver.—*Spicer v. The State, supra*; 1 Bish. Cr. Proc. § 271. The distinction between the principle settled here and that in *Paris'* case (36 Ala. 232) is fully pointed out in *Spicer v. The State, supra*, and nothing need be added on that point. The two decisions are in perfect harmony.

Without deciding it to be error to excuse a juror from service before a capital felony is regularly called for trial, when he is shown to be exempt by statute, we are of opinion that the safer practice is not to excuse any juror in advance of the trial until he claims the privilege of such exemption on his name being regularly drawn.—*Parsons v. The State*, 22 Ala. 50.

There was no error in sustaining the objection of the solicitor to the questions propounded to the witness Cain. It was totally immaterial as to whether or not any charge had been made against the defendant upon the occasion of the coroner's inquest touching the present homicide. It does not appear that any of the State witnesses had testified before the coroner, and the questions propounded could have no pertinency except for the purpose of impeachment in such event. The guilt or innocence of the prisoner can in no manner be affected by *ex parte* statements made in his absence, whether they be inculpatory or exculpatory.

For like reason the written statement of the witness Finnegan, taken at the coroner's inquest, was properly excluded, especially in view of the fact that the witness was not shown to be deceased.—*Dupree v. The State*, 33 Ala. 380.

The court properly excluded the testimony of the witness Scott Smith, which was offered by the defendant. He was shown to have been duly convicted of the offense of petit larceny, and this fact operated to entirely disqualify him from testifying in a court of justice. At common law, persons convicted of crimes which rendered them *infamous* were excluded

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from being witnesses. An infamous crime was regarded as comprehending treason, felony, and *crimen falsi*, and, in the absence of existing statutory provisions, the common law rule is now the law of this State.—*Taylor v. The State*, 62 Ala. 164. We are of opinion that a conviction of petit larceny at common law rendered a witness infamous. Grand and *petit larceny*, according to the better opinion, were both felonies at common law.—Bish. Cr. L. § 974; 1 Hale, P. C. c. 43, p. 503. Lord COKE says that one convicted of petit larceny might be placed in the public pillory within the discretion of the judges, and this was a punishment attached to infamous crimes.—3 Just. 218. It is the actual conviction and not the mere fact of guilt which disqualifies. So it is the nature of the crime, and not the magnitude of the punishment, which constitutes a blemish on the moral character, and thereby incapacitates to testify by rendering infamous. The test seems to be, “whether the crime shows such depravity in the perpetrator, or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath.” 1 Bish. Cr. L. § 974 Upon reason and authority alike, we think the witness was incompetent, and such seems to be the uniform holding of the courts both in England and America.—1 Whart. Ev. § 397, note: *Pendock v. Mackinder*, Willes (Com. Pleas), Rep. 665; *Lyford v. Farrar*, 31 N. H. (11 Fost.), 314; *State v. Gardner*, 1 Root, 485. It was incompetent to prove what was said by the witness Sawyer to Finnegan in the presence of Lynch, the deceased. No admission of the deceased would be admissible in evidence against the State, except as part of the *res gestæ*. It would be mere hearsay.

The questions put to Sawyer, touching his previous expressions of opinion when summoned as a juror in the case, were manifestly proper on cross-examination, as they served to test his bias or prejudices which had a tendency to color his testimony.

The charge given by the court, of its own motion, was correct. If the fatal wound was inflicted with a deadly weapon, this would be a fact from which the existence of malice could be inferred on the part of the perpetrator, and the character of the weapon used, whether deadly or otherwise, is in most cases a question for the jury, to be determined from its description by witnesses, the nature of the wound inflicted with it, the opinion of experts, and other circumstances in evidence.

The written charges numbered 20, 21 and 22, which were requested by the defendant, were properly refused. They entirely exclude from the jury the important consideration that the deceased was an officer of the law, and was killed while in the act of making a lawful arrest, and erroneously assume that

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the killing was perpetrated in a mutual encounter between combatants fighting on equal terms. They further falsely assume as a truism, that an ordinary pocket-knife, capable in its use of producing death, may not be a deadly weapon.

The fifth charge was also properly refused. Dying declarations are not admissible in evidence merely on the ground that they are not wilfully or intentionally false. They are admitted rather from the necessity of the case, in order to bring manslaughterers to justice, and because, being uttered under a sense of impending death, the solemnity of the occasion is tantamount to the safeguard of an oath.

If these declarations pointed to the identity of the defendant, as the perpetrator of the killing, with the same clearness and certainty as if the deceased had designated him by name, they were entitled to as much weight on the part of the jury as if defendant's name had been expressly mentioned. We understand the second charge, given on request of the solicitor, to only assert this view.

The third charge, given on request of the solicitor, was also unobjectionable. The flight of a defendant may or may not be considered as a circumstance tending to prove guilt, as this depends upon whether the motive of such flight had its origin in a consciousness of guilt, and a pending apprehension of being brought to justice; or whether, on the other hand, it can be explained as attributable to other and more innocent motives.

The first charge given at the instance of the solicitor was obscure and involved in meaning, and was not entirely free, perhaps, from the vice of being misleading. This, however, could have been corrected by requesting a counter explanatory charge in behalf of the defendant.

There is nothing in the other exceptions to the evidence.

For the error in the record first mentioned, the judgment of the City Court must be reversed and the cause remanded for a new trial. In the meanwhile the prisoner will be held in custody until discharged by due course of law.

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Contest of Claim of Exemption to a Debt sought to be subjected by Garnishment to Payment of a Judgment.

1. *Garnishment*; a legal proceeding.—A garnishment is not an equitable, but essentially a legal proceeding; and only such demands as the
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debtor, by an action at law in his own name, can enforce, the creditor may thereby reach and condemn.

2. *Same; when legal demand can not be subjected.*—If, however, a legal demand is complicated and involved with matters strictly and purely of equitable cognizance, which must be adjusted before full and complete justice can be done, it can not be reached by garnishment, and the parties will be remitted to a court of equity.

3. *Sale of land under power contained in mortgage, where mortgagee becomes the purchaser; effect of.*—A sale of land under a power contained in a mortgage, at which the mortgagee became the purchaser, at a bid less than the mortgage debt, cuts off and bars the equity of redemption, and the mortgage debt is thereby satisfied and extinguished to the extent and amount of the mortgagee's bid, by mere operation of law; and thereafter the mortgagee can maintain an action at law to recover only so much of the debt as his bid may not have satisfied.

4. *Same; may be disaffirmed in equity by mortgagor.*—Such sale is binding on the mortgagee, and can only be disaffirmed at the election of the mortgagor, or those claiming under him, if seasonably expressed, and by them only in a court of equity. A court of law, looking only to the legal title vested in the mortgagee, and being incapable of adjusting the equities between the parties, and of granting the relief essential to a termination of all litigation, and to full and complete justice between them, can not avoid the sale.

5. *Same; when bid less than debt, balance of debt a lawful charge under the statute of redemption.*—Where a sale of land is made under a power contained in the mortgage, and the mortgagee becomes the purchaser at a bid less than the amount of the mortgage debt, conceding that the statutory right of redemption extends to such a sale, a question not decided, the balance of the debt is a *lawful charge* on the land, which the mortgagor coming to redeem is bound, under the statute, to pay; and an offer to redeem which does not include such balance, is insufficient.

6. *Same; when tender insufficient.*—In such case a tender by the mortgagor of the amount bid by the mortgagee, with ten per cent. *per annum*, is insufficient, although accompanied by an offer to pay *all lawful charges*, where it is manifest that, in the use of the words "lawful charges" in the offer, he did not intend to include the balance due on the mortgage debt.

7. *Offer to redeem lands; effect on sale in a court of law.*—Estoppels or ratifications resting merely in parol can not, in a court of law, affect the title to land; and hence, an offer to redeem land sold under a power contained in a mortgage, resting merely in parol, can not, in a court of law, be deemed a ratification or confirmation of the sale, even if that court could inquire into the affirmance or disaffirmance of such sale.

Appeal from Hale Circuit Court.

Tried before Hon. GEO. H. CRAIG.

This was a contest of an exemption claimed by Frank M. Harris, the appellant, to a debt which William H. Locke owed him, and which William G. Miller, the appellee, sought, by process of garnishment, to subject to the payment of a judgment for \$243.87, which he recovered on 18th April, 1877, in the Circuit Court of Hale county against Harris. The garnishment was issued on 11th July, 1877, and was served on the same day. The admissions and statements made by the garnishee in his answer, which was filed on 13th October, 1877, may, for the purposes of this report, be stated as follows: On

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22nd of February, 1873, the garnishee borrowed from Harris \$800, and gave him his promissory note for \$864, the amount borrowed and interest for one year, payable on 22nd of February, 1874; and on the same day, to secure the payment of this note, he executed to Harris a mortgage on an undivided half interest in a certain house and lot situated in the town of Greensboro, and also on an undivided half interest in a certain tract or parcel of land near Greensboro, containing fifty acres, with a power of sale on default. On 1st March, 1875, default having been made in the payment of the note, the property conveyed by the mortgage was sold under the power of sale, one Breen purchasing the mortgaged interest in the tract of land near Greensboro for \$175, and Harris bidding in for himself the half interest in the lot in Greensboro, at \$500. On 23rd of February, 1877, the garnishee tendered to Harris the sum of \$600 to redeem the interest in the lot in Greensboro bid in by him, and also "at the same time tendered to the said Harris any and all lawful charges that he might have." This tender Harris refused to accept, and also refused to inform the garnishee whether or not there were "any other lawful charges due him." The garnishee was in possession of this property at the time he filed his answer.

On 30th October, 1877, Harris filed with the clerk of the Circuit Court his affidavit, claiming the balance due on the debt as exempt, and stating the amount of such balance to be \$760; and with his affidavit he filed an inventory of his personal property, as required by statute, which aggregated in value \$240. On 25th March, 1878, Miller, the plaintiff in the judgment, filed his affidavit under the statute, contesting the claim of exemption, and averring, "that in the belief of this affiant the said claim is invalid in part, and specifies and says, that the indebtedness of the garnishee, W. H. Locke, to him, the said Harris, was, at the time of the service of said garnishment, \$902.97, as shown by the answer of said Locke as garnishee, and not \$760, as stated by said Harris in his claim of exemption; and that at this time the amount of said Locke's indebtedness to said Harris is \$948.29, and that said amount, due from Locke, together with the personal property claimed by said Harris in his affidavit of exemption, amounts to more than \$1,000, the amount allowed him by law."

On the trial of the contest, had at the spring term, 1879, of said court, on an issue made up under the statute, the garnishee, Locke, was examined as a witness on behalf of the plaintiff, and the defendant on his own behalf. The loan of the money, the execution of the mortgage, the sale under the power contained therein, and the purchases by Breen and the defendant were shown by the testimony of both witnesses to be

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substantially as stated in the answer of the garnishee. The testimony of Locke as to the tender was, that on 23rd of February, 1877, he tendered to Harris \$600, "and offered the amount paid by said Harris for the interest in said house and lot at said mortgage sale, \$500 with ten per cent. *per annum* thereon, and offered to pay all other lawful charges which said mortgagee had against him, to redeem said interest in said house and lot, which said Harris refused to accept." He also testified, that "there was then due on the said note and mortgage \$933.12, together with the lawful charges for advertising and selling said property." On cross-examination, however, he testified that, in arriving at this amount "he had included the \$500 bid by Harris for the house and lot upon the assumption, that by the tender of the \$600 the title to the house and lot was restored to witness, and that Harris had no mortgage thereon, but that he, witness, owed Harris the amount of the tender as a debt; . . . that the amount so tendered he included as an unsecured indebtedness from him to Harris, and, in stating his present indebtedness to Harris, he did not treat the \$500 bid at the sale as a credit on his mortgage; and that if it were so treated, holding his tender as insufficient, and the title to the house and lot still in Harris, by the purchase at the mortgage sale, his indebtedness" would be decreased by that amount and interest thereon. He further testified, that he made the tender under advice of counsel, by whom he was advised, that he could redeem from Harris by paying the amount of the bid, \$500, ten per cent. *per annum* thereon, and all lawful charges. The defendant testified that he declined to receive the tender "or any thing less than the amount due on the note and mortgage."

This being the substance of the evidence introduced on the trial, the court, at the written request of the plaintiff, charged the jury "that under the evidence in this case \$179.50 of the debt, which garnishee, W. H. Locke, owed the defendant, F. M. Harris, is liable to the satisfaction of plaintiff's debt, and that their verdict must be in favor of the plaintiff, condemning \$179.50 of the Locke debt." The defendant excepted to this charge, and asked the court in writing to charge the jury as follows: "If the jury believe from the evidence that the tender of Locke to Harris of \$600 was less in amount than was then due on the debt from Locke to Harris, secured by mortgage, with interest thereon, and all other lawful charges, then such tender does not have the effect to re-invest Locke with the title to the house and lot, which Harris, the mortgagee, had purchased at a sale under the mortgage to him for \$500; and such sum of \$500 can not be treated as a debt still due Harris from Locke, but as a credit on the mortgage debt, thereby reducing

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the amount which Locke owed on said mortgage debt; and the balance still due from Locke is not sufficient to make Harris' claim of exemption exceed the amount allowed in personal property by law." This charge the court refused to give, and the defendant excepted.

There was a judgment for the plaintiff condemning \$179.50 of the debt due defendant by Locke to the payment of his judgment, from which the defendant appealed, and here assigns the rulings above noted as error.

THOS. R. ROULHAC, for appellant. (1) The purchase made by Harris at his own sale under the power contained in the mortgage, was a payment *pro tanto* of the mortgage debt. Applying this payment, it is clear that the balance would be exempt. (2) But it is contended that this payment was in effect destroyed by the tender which Locke afterwards made to Harris. It is submitted on behalf of the appellant, that garnishment is not the remedy to try that question, or to determine the rights of the parties growing out of the tender made by Locke. Garnishment and the proceedings thereunder are strictly legal and statutory. As a legal remedy, it can not be resorted to for the determination of other than legal rights; as a statutory remedy, it is applicable only in the instances, and to the extent which the statute prescribes.—*Henry v. Murphy & Co.*, 54 Ala. 246; *Toomer, Sykes & Billups v. Randolph*, 60 Ala. 356. There must be a debt owing by the garnishee to the defendant, for which the latter may maintain debt or *indebitatus assumpsit*.—*Walke v. McGehee*, 11 Ala. 273; *Bingham v. Rushing*, 5 Ala. 403; *Cook v. Walthall*, 20 Ala. 334; *Lundie v. Bradford*, 26 Ala. 514; *Henry v. Murphy*, 54 Ala. 246; *Toomer, Sykes & Billups v. Randolph*, 60 Ala. 360; *Price v. Masterson*, 35 Ala. 492. The effect of the tender and the rights of the parties thereunder can be adjudicated and determined alone in a court of equity; and garnishment, being a legal proceeding, simply and merely, is not the remedy. *Roby v. Labuzan*, 21 Ala. 60; *Henry v. Murphy*, 54 Ala. 246; *Harrell v. Whitman*, 19 Ala. 135. (3) Conceding that a full tender by Locke to Harris would revest, *proprio vigore*, in Locke the title to the property conveyed by him under the mortgage, and bid in by Harris at the mortgage sale, nothing less than the whole amount due on the mortgage debt, with the interest and proper charges, would so operate, when proceeding from the mortgagor to the mortgagee. In this State, and certainly after the law-day of the mortgage, the mortgagee has the legal title to the land.—*Welsh v. Phillips*, 54 Ala. 309; *Barker v. Bell*, 37 Ala. 358; *Childress v. Monette*, 54 Ala. 318; *Toomer, Sykes & Billups v. Randolph*, 60 Ala. 360.

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And the only way the mortgagor can divest the legal title conveyed by the mortgage, when the mortgagee has not parted with it, is by payment of the mortgage debt.—1 Hill. on Mort. ch. 14, p. 223; 2 Jones on Mortg. § 1072; *Collins v. Riggs*, 14 Wall. 491; *White v. Hampton*, 13 Iowa, 264; *Ten Eyck v. Casad*, 15 Iowa, 524; *Johnson v. Harmon*, 19 Iowa, 56; *Barker v. Bell*, 37 Ala. 354; *Powell v. Williams*, 14 Ala. 476; *Gliddon v. Andrews*, 14 Ala. 733. (4) It was further contended by appellant's counsel, in an elaborate argument, that a mortgagee, purchasing at his own sale, under a power contained in the mortgage, is not *the purchaser* from whom, under the Code, redemption can be made by the debtor, by paying the purchase-money, percentage and charges.

J. E. WEBB, *contra*.—(1) The purchase by Harris, the mortgagee, at his own sale, was not void, but voidable merely, and that only at the election, and on the application of Locke, the mortgagor. Nor did Locke, by seeking to redeem under the statute, seek to avoid the sale; but he thereby ratified it as a foreclosure of the mortgage.—1 Hilliard on Mort., p. 142, § 22; *Williams v. Hatch*, 38 Ala. 342; 45 Ala. 482; 41 Ala. 693; 29 Ala. 367; 27 Ala. 758. (2) It is not necessary for the appellee to maintain that the tender made by Locke re-invested him with the legal title to his house and lot, for that is not the question at issue. Whether he did or did not, when he tendered to Harris the \$600 *and all lawful charges*, if it is true, as contended for the appellant, that the balance of Locke's debt over and above the \$500 was a lawful charge, then it follows that Locke became debtor to Harris for the whole amount of money originally borrowed, with interest, less the amount of Breen's purchase, \$175. (3) The right of redemption under the statute is entirely different from the equity of redemption residing in a mortgagor before foreclosure of the mortgage. The foreclosure, whether by decree of a court of equity, or by sale under a power, forever cuts off the equity of redemption. *Childress v. Monette*, 54 Ala. 317. The statutory right of redemption only begins where the equity of redemption is cut off. It is not disputed that a mortgagor, where he seeks to redeem under his equity of redemption before foreclosure, must tender the whole mortgage debt. But when he comes to redeem under the statute after a foreclosure, then he must look to the statute for his rights, and to determine what he must do.—*Trimble v. Williamson*, 49 Ala. 525; 32 Ala. 9; 37 Ala. 354; 14 Wall. 491. (4) The title of the purchaser at mortgage sale is outside of, and beyond the mortgage title. It is independent of any balance that may be due to the mortgagee upon the debt. And when the mortgagor, after such sale, comes to re-purchase

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or buy back his title from the purchaser, he treats with him as purchaser, and not as mortgagee. Then how can it be said that any balance of the mortgage debt, unsatisfied by the sale, is a lawful charge upon such purchaser's title? The mortgage, as a mortgage, that is, as an incumbrance, is forever discharged. That was the object and effect of the sale. Hence we say that when Locke came to redeem from Harris, as purchaser, he was not bound to tender or pay to Harris any balance that might be due to him on his note, which was then an unsecured debt; and that the tender which Locke did make to Harris, made him the debtor to Harris for that amount, for the \$600 so tendered, *as well as the balance* that he owed him on the note. (5) Locke's tender was not only the \$600, but also *all lawful charges*. If the balance due to Harris was a *lawful charge*, then Locke's tender certainly covered and included it. Section 2879 of the Code of 1876 declares that such *tender* re-invested the title in him and made him a debtor to Harris.

BRICKELL, C. J.—On first examination of this cause, we were of opinion there was no error in the record of injury to the appellant. Further examination has led us to a different conclusion. A garnishment is not an equitable proceeding. It is essentially a legal proceeding, assimilated to an attachment of personal property; and, in its nature and operation, is the institution of a suit by a creditor against the debtor of his debtor. Only such demands, as the debtor by an action at law in his own name can enforce, the creditor may reach and condemn by this remedy; and whatever defenses would prevail if the debtor were himself suing, will avail against the garnishing creditor. Equitable demands can not be reached, and if a legal demand exists, complicated and involved with matters strictly and purely of equitable cognizance, which must be adjusted if full and complete justice is done, the parties will be remitted to a court of equity.—1 Brick. Dig. 175, §§ 313-14; *Toomer v. Randolph*, 60 Ala. 356.

The relation existing between the appellant, Harris, and the garnishee, Locke, was that of mortgagor and mortgagee. By the mortgage Harris became clothed with the fee-simple estate in the lands, which was subject to be defeated, if, on the law-day, the mortgagor paid the mortgage debt. After the law-day, and default in the performance of the condition, in the contemplation of a court of law, the estate was freed from the condition annexed to it. There remained in the mortgagor no more than the equity of redemption, of which, as between mortgagor and mortgagee, courts of law do not take notice.—*Welsh v. Phillips*, 54 Ala. 309.

The equity of redemption was subject to foreclosure; it could
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be cut off and barred by a sale under the power contained in the mortgage. At such sale, the mortgagee could become a purchaser, and by his purchase the mortgage debt would be satisfied and extinguished, to the extent and amount of the mortgagee's bid, by mere operation of law; the law of itself applying the bid to the payment of the mortgage debt, and of such expenses incident to the sale, as were necessarily incurred, or, it may be, by the mortgage stipulated, should be paid from the proceeds of sale. Thereafter the mortgagee can maintain an action at law to recover only so much of the mortgage debt as the bid may not have satisfied.—2 Jones on Mort. § 953.

While the mortgagee may purchase at a sale made under a power in the mortgage, the mortgagor may, at his election, disaffirm the sale, if the election is seasonably expressed. The mortgagor only, or those claiming under him, can disaffirm the sale. On the mortgagee it is binding, and his only right and remedy, if the mortgagor does not come in to disaffirm or avoid, is to resort to a court of equity to remove all doubt and uncertainty from the title by a confirmation of the sale, or by a resale under a decree of the court, if that shall appear to be equitable.—*McLean v. Presley*, 56 Ala. 211. It is, however, only in a court of equity that the sale may be disaffirmed. At law, in the absence of actual fraud, if the sale has been regular, it is valid, and the mortgagee is regarded as clothed with the legal estate, upon which he can maintain ejectment against the mortgagor.—2 Jones on Mort. § 1876; *Charles v. Du Bose*, 29 Ala. 367; *Hawkins v. Hudson*, 45 Ala. 482. The court of law can not avoid the sale, because it is incapable of adjusting the equities between the parties. When the election to disaffirm the sale is manifested, the mortgagee becomes chargeable as a trustee of the rents and profits while he may have been in possession, which are by a court of equity applied to pay the mortgage debt, and, if after applying them, there is a balance of the mortgage debt unpaid, a sale of the lands will be ordered to pay it. The relief essential to full and complete justice between the parties, and to put an end to all litigation between them, a court of equity alone can grant. Therefore it is, and because a court of law looks only to the legal estate in lands; that the sale in that court is operative and valid, and can be avoided only in a court of equity.

The sum bid by appellant for the lands at the mortgage sale, having to the amount of the bid satisfied and extinguished the mortgage debt, the balance of the debt, added to the value of the specific articles of personal property claimed and retained by the appellant, did not equal one thousand dollars, the amount of the exemption to which he was entitled. The sale was not affirmed or disaffirmed by the offer of the mortgagee to redeem

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under the statute, if it were conceded that the statutory right of redemption extends to a sale at which the mortgagee becomes the purchaser. The offer was not of the kind or character on which a statutory redemption could be effected. Though it is said it embraced all *lawful charges* the appellant may have had on the land, it is manifest it did not embrace the payment of the entire mortgage debt, and that the object in making the offer was to remove so much of the debt as was unpaid after deducting the amount bid at the mortgage sale, as an incumbrance or charge on the lands. A mortgagor, coming to redeem under the statute, is bound by the terms of the statute to pay, not only the sum bid at the mortgage sale, with ten per cent. *per annum* thereon, but *all other lawful charges* which the purchaser may have or can assert. The word *charge*, as we have heretofore said, is of very large signification, and in the statute its proper signification is every lien, or incumbrance, or claim the purchaser may have on the premises, and for which at law or in equity he would be entitled to hold the lands as security, or to the satisfaction of which a court of equity would condemn them.—*Grigg v. Banks*, 59 Ala. 311; *Lehman, Durr & Co. v. Collins*, 69 Ala. 127. The *charge* may and will vary with different purchasers. Whether the mortgagee or a stranger may be the purchaser, if he removes a valid incumbrance on the lands, whatever was justly expended in the removal becomes a *charge* the mortgagor coming to redeem is bound to pay, and the offer to redeem will not be sufficient, if, when its amount is known, it is not embraced. It is a just and plain principle of the law of mortgages, that payment of the mortgage debt is a condition precedent to redemption.—*Gliddon v. Andrews*, 14 Ala. 733. This principle the statute of redemption was not intended to disturb or change. And if the statute extends to sales at which the mortgagee becomes the purchaser, the mortgagor can not redeem without paying the entire debt. The debt, so far as it is not extinguished by the bid at the mortgage sale, is a *lawful charge* on the land. For if the redemption were effected, the title acquired would at once enure to the benefit of the mortgagee, and for the unpaid balance of the mortgage debt the mortgage would be a valid, operative security.—*Stewart v. Anderson*, 10 Ala. 504. The demand of the mortgagor to be let in to redeem without paying the mortgage debt, is opposed to the plainest dictates of right and justice, and is not sanctioned by any principle prevailing in courts of law or of equity. If the purchase by the mortgagee has been at a sum disproportionate to the value of the lands, or if the lands have increased in value, the mortgagor, by a mere disaffirmance of the sale in a court of equity, can obtain a re-sale, protecting himself from all loss. Not only can he obtain a re-sale, but he

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can convert the mortgagee into a trustee of the rents and profits, having them applied to pay the mortgage debt. The mortgage, however, would remain a security for the whole debt, and exact justice would be meted out to both parties. A sale under a power in a mortgage, fairly made, operates as a strict foreclosure by a decree of a court of equity—it cuts off and bars the equity of redemption. This is true only, however, when a stranger becomes the purchaser. It is only partially true, when the mortgagee becomes the purchaser, and the restoration of the parties to the relation of mortgagor and mortgagee rests in the mere election of the mortgagor. The statute, and the statutory right of redemption, can not be perverted into an instrumentality, by which the mortgagor may deprive the mortgagee of the security for the debt which the mortgage affords. The offer to redeem made by the mortgagor did not vary his relation to the mortgagee. The mortgage debt, in a court of law, and until the sale under the mortgage is disaffirmed, is paid to the amount bid by the appellant at the mortgage sale, and he is the owner of the lands.

The offer to redeem under the statute rests merely in parol, and can not in a court of law, if that court could inquire into the affirmance or disaffirmance of the sale, be deemed as a ratification or confirmation. Estoppels or ratifications resting merely in parol can not in a court of law affect the title to lands.—*Gimon v. Davis*, 36 Ala. 589.

Upon the undisputed facts, the debt sought to be reached by the garnishment, must be regarded as having been paid to the extent of the bid of the appellant at the mortgage sale, and being extinguished to that extent, the remainder was exempt to the appellant. The rulings of the Circuit Court were not consistent with these views.

Reversed and remanded.

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Bill in Equity to establish Resulting Trust in Land.

1. *Resulting trust; how created.*—Where a man buys land in the name of another, and pays the consideration-money, in the absence of all rebutting circumstances, the land will be held by the grantee in trust for him who pays the consideration-money. This trust results, by mere presumption of law, without any proof of the actual intention of the parties, from the fact that one pays the consideration-money, while the other receives the title.

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2. *When trust must be evidenced in writing; statute of frauds.*—When the trust does not arise from facts attending the creation of the legal estate, but is dependent on the agreement or declaration of the parties, it can not rest in parol, but must, under the statute of frauds, be created by writing, signed by the party declaring or creating the same, or his agent or attorney lawfully authorized thereto in writing.

3. *Same.*—Where a trust in land, attempted to be established, imposes, by agreement of the parties, active duties on the trustee, it is not such a trust as results by implication of law, and is not valid, unless it was created by instrument in writing signed by the party creating or declaring the trust, or his agent or attorney lawfully authorized thereto in writing.

4. *Jurisdiction of courts over lands in another State.*—As to lands situate in another State, the courts of this State can exercise no jurisdiction *in rem*, or affecting the *res*; but if title or power affecting such lands was obtained by duress or fraud, upon proper averments, a personal decree may be had, vacating such title or power; or if such lands have been converted into money, or money has been realized from them, by one acting under a fraudulent title or power, he can be compelled to account, either in law or in equity, as the nature of the accounts, or the character of the relief may require.

5. *Decree sustaining demurrer not final.*—A decree which simply sustains a demurrer, without further order disposing of the cause, is not a final decree.

APPEAL from Lawrence Chancery Court.

Heard before Hon. THOMAS COBBS.

The bill in this cause was filed in November, 1880, the day of the month not shown, by William F. Rose and Julia F. Rose, his wife, against Orson D. Gibson and Mary J. Gibson, his wife, Joseph Lee and Rebecca Lee, his wife, Robert Wilson and Martha Wilson, his wife, and James M., Jacob, and Levi Warren; and its material averments are, in substance, as follows: Levi F. Warren, late of Lawrence county in this State, died intestate, about the year 1870, leaving Nancy A. Warren, his widow, and, as his only heirs-at-law, the said James M., Jacob, and Levi Warren, Mary J. Gibson, Martha Wilson, Rebecca Lee, and complainant Julia F. Rose, all of full age. At the time of his death, said decedent left no debts, and no administration was ever had on his estate, and no necessity existed for such administration. Levi F. Warren, "at his death owned" a large and valuable tract of land in said county, a particular description of which is given in the bill. In the early part of 1867, under an execution issued on a judgment which had been recovered against the said Levi F. Warren in the Circuit Court of said county, these lands were sold at sheriff's sale, and, at his request and for his benefit, Thomas J. Warren, his nephew, bid them off and the same were conveyed to him by the sheriff; but the purchase-money thereof was paid by Levi F. Warren, Thomas J. Warren accepting the title at the request, and solely for the benefit of the said Levi F. Warren. "Not long afterwards," Thomas J. Warren, at the request, and for the

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exclusive use and benefit of the said Levi F. Warren, conveyed said lands to Orson D. Gibson, the said Gibson paying nothing therefor, but receiving "the said lands on the same trust, on which said Thomas J. Warren received the same." The bill charges that Gibson was not "a purchaser of the said lands nor has he ever pretended to be a purchaser of the same; but that he accepted the title to the same from said Thomas J. Warren, to hold the same for the exclusive use and benefit of the said Levi F. Warren and at his request; that said Gibson was the son-in-law of the said Levi F. Warren, and that by the death of the said Levi F. his right to the property devolved (?), by operation of law, to his children, the complainants and defendants to this bill of complaint; and complainants say that no other persons are interested as heirs in said property." The bill further avers, "that during the whole time of the said trust of the title of said Thomas J. Warren, and during the whole time of the trust of the said lands in Orson D. Gibson, the beneficiary, Levi F. Warren, remained and was in possession of all of the said lands; that he resided on them, not changing his residence; that he had the same cultivated by his tenants and laborers whom he employed so to do; that he collected the rents, gathered the crops, and fully and completely enjoyed the usufruct of the said lands during his entire lifetime; and that he died in the possession and enjoyment of the same as fully as though the legal title had been in himself;" that his said heirs-at-law are entitled to have said lands divided among them, but that in the division "reference should be had to the advancements which their common ancestor had made to each of his children," a statement of which is given. It is also averred that "said Gibson had compromised the widow's dower interest in said lands, "for which he had paid her some money, and the said lands are charged with the payment of other sums, all of which are shown by the judicial proceedings in that case(?), and complainants hereby ratify and confirm the same, and are willing that the said Gibson shall have credit for the same in the settlement of his accounts and rents." The bill also contains this averment: "Complainants show that whatever money said Gibson has paid on said lands in the execution of his trust, they are willing should be allowed him on settlement. Further show that the rents of said lands have been worth about eighteen hundred dollars *per annum* since said Gibson has had possession of the same, besides the rents of the Texas lands."

The bill further alleges "that the said Levi F. Warren died the owner and was seized and possessed of a considerable quantity of lands in the State of Texas, the location, quantity and value of the same complainants are unable to give. They further show, that said Gibson obtained from complainants their

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signatures to a paper respecting the same, the contents and purpose of which, and the use which the said Gibson intended to make of the same, they were not fully informed; nor has he ever informed them what he did with the said lands. Complainants allege and believe that the said Gibson has used the said lands in Texas in paying off and discharging the claims and interest of the said Jacob Warren, James M. Warren and Wilson and wife in the property of the said Levi F. Warren. And complainants allege that the said lands are worth not less than the sum of fifteen thousand dollars, and that the rents are worth the sum of one thousand dollars *per annum*. Complainants pray, that the said Gibson may show what he has done with the said lands in Texas; and that he may be required to account for the same with the annual rents on the same."

The prayer of the bill is further, "that all the parties defendant may show what each has received by way of advancement, and what each one has received of the assets of said estate since the death of said Levi F. Warren; that the said Gibson may be required to account with complainants in respect to his said trust; that he shall show what amount of rents and cotton and other assets he has received of said estate; that he shall be required by an order of this court to pay into court all the money he has received for rents and for the sale of any of the property of said estate, and that a receiver be appointed to take charge of the said land and rent the same out; and that your Honor would divide and distribute the said property among the heirs of Levi F. Warren according to law," and for general relief.

The defendants Gibson and his wife demurred to the bill, assigning numerous grounds, a statement of which are not deemed necessary to an understanding of the opinion. The chancellor was, on the hearing, of the opinion that the demurrer was well taken, and caused a decree to be entered sustaining it. From that decree this appeal was taken, and it is here assigned as error.

DAVID P. LEWIS, for appellant. (No brief came to the hands of the reporter.).

W. P. CHITWOOD, *contra*.—(1) A conveyance made to hinder, delay and defraud creditors is valid as to the parties, and they, their heirs, or those claiming under them, are estopped from disputing its validity. None but creditors can attack the conveyance.—*King v. King*, 61 Ala. 479; *Pickett v. Pipkin*, 64 Ala. 520; *Evans v. Welch*, 63 Ala. 255; *Thames & Co. v. Rembert*, 63 Ala. 570; *Strange v. Graham*, 56 Ala. 614; *Marler v. Marler*, 6 Ala. 367; 2 Brick. Dig. p. 16, § 45. While it may be contended that the bill does not show that

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the deeds were made to hinder, delay and defraud creditors, enough is alleged in the bill to call for an explanation, why these conveyances were made by the sheriff to Thomas J. Warren, and by him to Orson D. Gibson. The bill ought to show that Levi F. Warren was then free from debt, and that the transaction was honest, and not made to hinder, delay and defraud his then existing creditors.—*Patton v. Beecher*, 62 Ala. 579. (2) If a defendant furnish money to buy his land, though the sale may be void as to creditors, it is good as against the defendant in execution.—2 Brick. Dig. p. 16, § 40; *Abney v. Kingsland*, 10 Ala. 355; *Eddins v. Wilson*, 1 Ala. 237. (3) Trusts in lands, except such as result by implication or construction of law, can not be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney lawfully authorized thereto in writing. Code of 1876, § 2199; *Patton v. Beecher*, 62 Ala. 579. That case is well considered, and refers to, and explains fully *Kennedy v. Kennedy* (2 Ala. 571), *Bishop v. Bishop* (13 Ala. 475), *Barrell v. Hanrick* (42 Ala. 60), and other authorities cited and relied on by the solicitor for the appellant. There could be no trust in the lands in controversy under the allegations of the bill, otherwise than by agreement between the parties to the deeds, and any such agreement would be void, under the decision in *Patton v. Beecher*, *supra*, unless it was in writing. (4) When a resulting trust is sought to be established and engrafted on a conveyance which is absolute in its terms, the complainant must, by his bill, distinctly and precisely aver the facts from which it is claimed to result, and the proof must correspond with the pleadings.—*Lehman v. Lewis*, 62 Ala. 133; *Patton v. Beecher*, 62 Ala. 579. This is not done in the bill in this case. (5) The *lex loci rei sitæ* must govern as to the Texas lands. "The disposition, succession to, and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicile at the time of his death;" but it is equally well settled in the law of all civilized countries, that real property, as to its tenure, mode of enjoyment, transfer and descent, is to be regulated by the *lex loci rei sitæ*.—2 Kent's Com. pp. 536-7; *Goodman v. Winter*, 64 Ala. 410; *Brock v. Frank*, 51 Ala. 85; *Varner v. Bevil*, 17 Ala. 286. It is contended that the court having obtained jurisdiction over the person in Alabama, it has the jurisdiction and authority to go on and grant relief as to the Texas lands. But it will be observed that the bill prays for a division and distribution of the property of said decedent, including these lands. That can not be done. The court can not enforce its decrees in the State of Texas. Its process would not be recognized and could not be enforced in that State. The court not

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being able to make a division of these lands, it can not give full relief as to them, and it will, therefore, remit the complainant to the courts in Texas, which can give them all the relief to which they are entitled.—Authorities *supra*; *Lide v. Parker*, 60 Ala. 165; *Harris v. Pullman*, 25 Amer Rep. 416.

STONE, J.—The present bill was filed to establish a resulting trust in lands in Lawrence county. Our statute of frauds, Code of 1876, § 2199, following the English statute of 29th Charles the Second, exempts from its operation such trusts as result by implication or construction of law, or which may be transferred or extinguished by operation of law. Mr. Justice STORY—Eq. Jur. § 1201—defines this species of trust as follows: “Where a man buys land in the name of another, and pays the consideration-money, the land will generally be held by the grantee in trust for the person who so pays the consideration-money.” He says, “it has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than for that of another; and that the conveyance in the name of the latter, is a matter of convenience and arrangement between the parties, for other collateral purposes.” And Perry, in his work on Trusts, vol. 1, § 126, employs language almost identical with that used by Mr. Justice STORY. Each alike states this to be the rule, *in the absence of all rebutting circumstances*. The rule has many exceptions, and the presumption does not arise, when the attendant circumstances are inconsistent with its existence. It is a mere presumption—a presumed intention—which the law raises, without any proof of the actual intention of the parties, other than the fact that one pays the consideration-money, while the other receives the title. If the title be taken in the name of the wife or child of him who supplies the money, this, without more, rebuts the presumption the law would otherwise raise. And, if “the trust is dependent on the agreement or declaration of the parties—when it does not arise from facts proved, attending the creation of the legal estate—it can not rest in parol. The statute is positive. It must be created by writing, signed by the party declaring or creating the same.”—*Patton v. Beecher*, 62 Ala. 579.

The averments of the present bill are not very clear or explicit on several questions. True, the bill charges that Thomas J. Warren purchased the lands at sheriff's sale under execution against Levi F. Warren, made in 1867, and that Levi F., the execution debtor, himself furnished and paid the purchase-money. It also charges that Thomas J. Warren conveyed to Gibson without any consideration, and that these several things

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were done at the instance and request, and for the benefit of the said Levi F. It further charges that no change of possession took place, but that said Levi F. continued to reside on the lands, and enjoy their exclusive use and emoluments until his death, some three years afterwards. The bill offers no explanation of the purpose for which the trust was created, nor of the character of duties, if any, which were imposed on the trustee. From any thing that appears in the direct averments of the bill, it was a naked or dry trust, imposing no duties on the trustee. Yet in section five of the bill is this language: "Complainants further show that whatever money said Gibson has paid on said lands in the execution of his trust, they are willing should be allowed him on settlement. Further show that the rents of said lands have been worth about eighteen hundred dollars per annum, since said Gibson has had possession of the same." Now, this clause of the bill pretty clearly indicates that the trust did impose duties on the trustee, and that he had paid out moneys in its execution. The clause copied contains another obscurity. The bill nowhere informs us who has had the possession of the lands since the death of Levi F. Warren, nor is it anywhere shown that Gibson has held the possession. Yet, the bill seeks to charge him with rents at \$1,800 per annum, "since he has had possession." The bill avers that Levi F. Warren died in 1870, and "left no debts, the same being all paid in full." The present bill was filed in November, 1880. It is not shown whether the alleged trust, first in Thomas J. Warren, and then in Gibson, was evidenced by writing. But the rule is that, as to contracts the statute of frauds requires to be in writing, it need not be averred in the pleading that they were in writing. That question arises on the evidence.

Under the principles settled in *Patton v. Beecher*,—62 Ala. 579—if the trust attempted to be set up in this case imposed, by agreement of the parties, active duties on the trustee, then it did not result by implication or construction of law, and is not valid, unless it was created by instrument in writing signed by the party creating, or declaring the same, or his agent or attorney lawfully authorized thereto in writing. And we may here repeat the forcible language employed in that case, that "it is difficult to conceive of any good motive a grantor can have in the execution of an absolute conveyance, intending that the grantee shall be the mere repository of a naked legal title, while he reserves the exclusive beneficial interest." We may add, if such conveyance is made, or procured to be made, with vicious intent—that is, with the intent either to delay, or to hinder, or to defraud creditors,—it is void, whether the trust be declared in writing or not.

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Another feature of the case made by the bill may be commented on. It charges that Levi F. Warren died in 1870. The present bill was filed in November, 1880, probably more than ten years afterwards. Now, it is not averred when Gibson took possession, nor, indeed, that he ever took possession. To be liable for rents, he must have had possession, actual or constructive; and yet rents are claimed in this suit.

We hold that the averments of the bill in this case, so far as they relate to the lands in Alabama, are too indefinite and ambiguous to base relief upon. To decree and establish a resulting trust, the allegations and the proof should be clear.

The averments of the bill as to the lands in Texas are still more faulty. As to lands without the State, our courts can exercise no jurisdiction *in rem*, or, affecting the *res*. If title or power affecting these lands was obtained from complainants by duress or fraud, then, upon proper averments and proof, complainants can obtain a personal decree, vacating such title or power. So, if Gibson has converted those lands into money, or has realized moneys from them, then he can be compelled to account, either at law or in equity, as the nature of the accounts, or the character of the relief may require.—*Lide v. Parker*, 60 Ala. 165.

The bill in its present form is too indefinite to authorize relief. We can not know whether the defects can be cured by amendment. If the complainants desire to amend, they must apply to the court below. The cause having been submitted only on demurrer, and decreed in vacation, it is still pending in that court. A decree, simply sustaining a demurrer, without further order disposing of the cause, is not a final decree.

Affirmed.

Edwards, Hudmon & Co. v. Meadows.

Action on Promissory Note; Defense, Failure of Consideration.

1. *Sale of personal property; what not a delivery.*—Where one agreed to sell to another a threshing-machine which had been loaned to, and was in the possession of a third party, and gave to the purchaser an order on the party in possession for the machine, the purchaser executing his note for the purchase-money,—*held*, in the absence of proof that the parties so intended, that this did not constitute a delivery of the machine, or vest the title thereto in the purchaser.

2. *Same.*—To constitute a delivery in such case, the party in possession must deliver the machine, or consent to attorn to the purchaser so as to become his bailee.

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3. *Same; waiver of delivery.*—If the purchaser in such case voluntarily consents to let the party in possession retain the machine for a definite period of time, as a matter of favor, this will operate a waiver of the delivery; but no such waiver can be implied from the fact, that the purchaser, acting under the moral coercion of necessity dictated by the situation, as where the bailee refuses to deliver until he has finished a certain amount of work, or agrees to deliver only after he has finished the work, merely submits to the bailee's continued possession as the best arrangement he can make under the circumstances. The party in possession does not thereby become the bailee of the purchaser, but he continues his original custody of the machine as the bailee of the vendor.

4. *Notice of sale under power contained in a mortgage; what sufficient.* Posting a notice of sale at the court-house door, and another at the post-office, in the city of Opelika, is a strict compliance with a power of sale contained in a mortgage, which required that the sale should be advertised by posting notices thereof "in two public places in Lee county."

APPEAL from Lee Circuit Court.

Tried before Hon H. D. CLAYTON.

This was a suit on a promissory note by Edwards, Hudmon & Co. against T. C. & J. Meadows, and was commenced on September 20th, 1881. The defendants pleaded (1) "that the consideration of the note sued on had failed," and (2) that said note was given for a threshing-machine which the defendants purchased, without seeing, it then being in the possession of one Bascom Brooks; that the machine was warranted to be in good condition in every respect, but when it was tendered to defendants, it was broken and in no respect sufficient for threshing grain, and that thereupon they refused to receive, and never did receive the same. Two other pleas were also filed, alleging a warranty of the machine, and a breach thereof, one of which was pleaded in bar, and the other claimed damages resulting from the breach of the warranty by way of set-off. From the judgment-entry it appears, that the cause was tried on issue joined on the pleas above stated.

The evidence introduced on the trial tended to show, that J. Meadows, acting for defendants, applied to the plaintiffs, who resided and did business in Opelika, in this State, in the summer of 1879, to purchase a threshing-machine. The plaintiffs showed him the only machine they then had, stating the price. Meadows, after examining the machine, remarked that he was not then ready to purchase, but that he would write from Salem by the afternoon's mail whether he would take it, requesting the plaintiffs not to sell until they heard from him; but to this the plaintiffs replied that they could not hold the machine, but would sell to the first purchaser they found. Meadows then left, and shortly afterwards the plaintiffs loaned the machine to one Brooks to be used by him until another machine, which they had ordered for him, arrived. Meadows on the same day wrote to plaintiffs from Salem, that he would take the machine, and on the morning of the following day he returned

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for the machine, when he was informed of the loan to Brooks, the plaintiffs further stating that they expected Brooks' machine in about ten days. Meadows returned for the machine about ten days afterwards, when the plaintiffs, having information leading them to believe that the machine ordered for Brooks would arrive that night, agreed to give to Meadows an order for the machine which they had loaned Brooks, which was done; and thereupon the said Meadows, in the name of the defendants, executed the note sued on, and also another note for \$70, and also a mortgage on the machine to secure the last mentioned note. This mortgage was introduced in evidence, and contained a power authorizing the plaintiffs to take possession of, and to sell the mortgaged property at public outcry, after "advertising for ten days by posting written notices in two public places in Lee county." Meadows took the order and delivered it to Brooks, who was then engaged in threshing wheat for one Harvey about six miles from Opelika. There was some conflict in the evidence as to what took place between Meadows and Brooks after the order was delivered. The evidence for the defendants tended to show, that Brooks on reading the order, said that "he did not know how about it," and afterwards said that Meadows "could not get the machine until he had threshed Harvey's grain, which he could do in a very short time;" that with this understanding Meadows went home, and returned on the next morning with a wagon to get the machine; that he found Brooks threshing wheat with the machine, and that Brooks then told him that "he had reconsidered the matter, that he had the deadwood on them, and that he would not let Meadows have the machine unless they [the plaintiffs] furnished him another;" that after this, and while Meadows "was waiting," a crank-shaft of the machine was broken, and Brooks thereupon sent an order to the plaintiffs for a new one. The testimony of Brooks, who was examined on behalf of the plaintiffs, tended to show, that, on reading the note from plaintiffs, he told Meadows that if he would allow witness to finish Harvey's wheat, which he could do in a few hours the next morning, witness would let him have the machine; that Meadows returned on the following morning for the machine, and that while witness was engaged in threshing Harvey's wheat, and while Meadows was waiting for the machine, a crank-shaft was broken. This witness further testified that the shaft could have been easily replaced with another at a small expense.

After the shaft was broken, as the evidence further tended to show, Meadows returned to the plaintiffs, told them what had occurred, and asked Edwards, one of the firm, whether "they did not intend to make some reduction, which Edwards refused to do," referring Meadows to the other plaintiffs with

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whom he had made the trade. "Some time afterwards," Meadows went to the office of the plaintiffs' book-keeper, and "asked to let him see the notes and mortgage he had given," and when they were handed to him, he said to the book-keeper that "he believed he would take them up." The book-keeper asked him whether he meant that he would pay the notes, to which Meadows replied, "no, I believe I will not take the machine." The book-keeper then demanded a return of the papers, and Meadows having refused to deliver them, they were taken from him by force. After the law-day of the mortgage, the plaintiffs took possession of the machine, and, after advertising the same for sale by posting written notices for ten days at the court-house door and at the post-office in the city of Opelika, they sold it at public outcry under the power contained in the mortgage; and at the sale they bid it in for \$100, which was shown to have been its fair value; and after paying the note for \$70, they applied the balance in part payment of the note sued on. It is not shown in whose possession the machine remained after Meadows refused to take it. This was the substance of the evidence introduced on the trial bearing on the questions raised by the bill of exceptions.

The court, in its general charge, instructed the jury, among other things, as follows: 1. "That if, at the time Meadows received the order, it was not accepted by him as an actual delivery of the machine, but simply as a means of getting it, there was not, at the time of such acceptance of said order, an actual sale, and plaintiff can not recover." 2. "That if the title to the machine did not pass to defendants at the time of their accepting the order therefor, unless the plaintiffs were able and willing to deliver the machine to the defendants, or the order was accepted as a delivery." 3. "That if, when Meadows presented the order to Brooks, the latter refused to deliver the machine to him, the plaintiffs can not recover, unless said Meadows waived the delivery, or unless the title passed to defendants at some other time." 4. "That if, when Meadows presented the order to Brooks for the machine, Meadows acquiesced in Brooks' retaining the machine until some time the next day, and, in the meantime, to thresh with it, but did not so acquiesce voluntarily, but only because it was the best he could do, and as a means of afterwards getting the machine, then there was no delivery, and the plaintiffs can not recover, unless Meadows had waived the delivery." 5. "That, if from the evidence the jury find that the title to the machine never passed into the defendants, the plaintiffs can not recover." 6. "That the posting of notices, one at the court-house, and one at the post-office in the city of Opelika, was not a strict compliance with the requirements of the mortgage as to the

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place where the notices should be posted; and that unless plaintiffs have showed a strict compliance in that particular, they can not claim the benefits of the sale, but would be responsible for the value of the machine, after it passed into their possession, irrespective of what it was sold for." To each of these instructions the plaintiffs duly excepted.

The jury returned a verdict for the defendant, on which judgment was rendered. The rulings of the court above noted are here assigned as error.

H. C. LINDSEY, for appellants. (1) The evidence shows that every element of an *executed* sale was present; the specific article was designated; there was an agreement for the transfer of the title, and the price was fixed. Therefore, the title passed, and the plaintiffs were entitled to recover, regardless of what became of the machine.—Benj. on Sales, pp. 219, 220; Story on Sales, p. 300, § 289, note 2; 1 Chitty on Con. p. 518; *Tuxworth v. Moore*, 9 Pick. 347; *Bullard v. Wait*, 16 Gray, 55. (2) The notices of the sale under the mortgage were posted in strict compliance with the power of sale contained therein.

W. J. SAMFORD and J. M. CHILTON, *contra*.—(No brief came to the hands of the reporter.)

SOMERVILLE, J.—Where a vendor makes sale of personal property in the custody of a third person, who is his bailee, and gives a delivery order to the vendee, it has long been settled that this will not amount to a delivery so as to vest the title in the vendee, until the order is presented and such third person agrees to become the bailee of the purchaser, expressly or impliedly.—Benj. on Sales, § 175, § 680; *Bentall v. Burn*, 3 B. & C. 423; *Barney v. Brown*, 19 Amer. Dec. 720. It is true that where the custodian or bailee assents in *advance* of the sale to become the bailee of the buyer, this assent might be irrevocable after the sale, and the title would pass. A refusal by the custodian afterwards to deliver would be, not a refusal to *become* bailee, but to *do his duty* as such under the previous agreement which constituted him bailee for the purchaser. Benj. on Sales, § 175. So where goods are merely on the premises of a third person, who is not a bailee for the owner, as in the case of one holding tortious possession, delivery may be effected by the vendor's putting the goods at the disposal of the vendee, so as to be, actually or constructively, under the exclusive dominion of the latter.—Benj. on Sales, § 178.

Brooks in this case was clearly the bailee of the appellants, the machine sold by them to Meadows being in his possession.

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The mere giving of the delivery order, without more, did not transfer the title of the property, or amount to a delivery, unless so intended mutually by the parties, and such intention must be evidenced by proper proof, circumstantial or direct. When the order was presented to Brooks, if he had consented to attorn to Meadows so as to become his bailee, the delivery would have been complete.

And so the delivery could have been waived by the purchaser, if he had voluntarily consented to let Brooks retain the machine until the next day, or for any definite space of time, as an act of free grace or favor from himself. But if Meadows acted under the moral coercion of necessity dictated by the situation, and merely allowed Brooks to continue in custody as the best arrangement he could make under the circumstances, Brooks would not thereby become his bailee, but continued his original custody as bailee of the vendors, Edwards, Hudmon & Co.

In *Magee v. Billingsley*, 3 Ala. 679, the giving of an order for cotton stored in a warehouse and in a deliverable condition was held *prima facie* to constitute a delivery. There the warehouseman, however, agreed to attorn to the vendee, and made a memorandum of the purchaser's name on his books in the usual manner of such sales. Custom, too, would probably exert a controlling influence in the case of sales of cotton kept on deposit by warehousemen, especially in large cities, which would take such transactions out of the operation of the ordinary rule governing other classes of bailees and other kinds of property.

The charges of the court in relation to the delivery of the property in controversy were in accordance with these views, and there was no error in them.

The court erred, however, we think, in charging that the posting of one notice at the court-house door, and another at the post-office, in the city of Opelika, was not a strict compliance with the requirement of the mortgage, which was that advertisement of foreclosure should be made by posting written notices "in *two public places* in Lee county." No two places in the entire county could probably have been selected which were more public, or where the attention of more persons would have been called to the intended sale. It would be unreasonable to suppose that separate municipalities were contemplated, or separate localities out of the same municipality.

Reversed and remanded.

[Snedecor, Adm'r, v. Watkins.]

Snedecor, Adm'r, v. Watkins.

Bill in Equity by Creditor to set aside Deed to Land as Fraudulent and Void.

1. *Bill in equity by creditor to set aside voluntary conveyance; when adverse possession for ten years by grantee a bar.*—Adverse possession for ten years by a grantee in a voluntary conveyance of land, executed while the grantor was surety on a guardian's bond, is, under the statute of limitations, a good defense to a bill filed by an administrator of the deceased ward, to have the conveyance set aside as fraudulent, and the land subjected to the payment of the guardian's liability to his ward.

2. *Same.*—As the purpose of the proceedings in such case is not to obtain a personal judgment on the debt or liability, or to recover the land, but to have the grantee declared a trustee *in invitum*, it is immaterial that the right of the complainant to proceed against the surety of the guardian arose within ten years prior to the commencement of the suit.

APPEAL from Greene Chancery Court.

Heard before Hon. THOMAS COBBS.

On 12th May, 1845, William W. Long was duly appointed by the Orphans Court of Greene county the guardian of Lunsford Long, a person of unsound mind, and, as such guardian, executed a bond in the penal sum of \$2,400, with Benj. L. Long and Bryan Watkins as his sureties, took possession of the estate of his ward, and continued as such guardian until his death, in 1865. After his death, in 1866, a final settlement of his guardianship was made by his administrator, and on that settlement it was ascertained that his estate was indebted to the ward in the sum of \$1,024.23. On 27th November, 1866, Bryan Watkins executed deeds of gift conveying certain lands to his children, who thereupon took possession, and have since continued in the open, notorious and adverse possession of the lands conveyed by the deeds, claiming title thereunder. In 1867, Bryan Watkins died, and afterwards his estate was declared insolvent, and as an insolvent estate was finally settled. In July, 1870, Lunsford Long, without having been restored to sanity, died, and in November, 1877, Frank P. Snedecor was appointed the administrator in chief of his estate. The bill in this cause was filed in March, 1879, by said administrator against Robert E. Watkins and others, the grantees in said deeds, seeking to have the deeds set aside as fraudulent and void, and the lands thereby conveyed sold for an alleged balance due the complainant as such administrator, on account of the

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said guardianship of his intestate. Among other defenses to the bill, the defendants pleaded that they had been in the open, notorious and adverse possession of the lands sought to be condemned for more than ten years, claiming title under said deeds, and that the complainant's claim, as against them, was barred by the statute of limitations of ten years.

On final hearing on pleadings and proof, the chancellor was of the opinion that the complainant was not entitled to relief, and caused a decree to be entered dismissing his bill; and that decree is here assigned as error.

SNEDECOR & HEAD, for appellant.

THOS. W. COLEMAN, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—This bill was filed by the administrator of a ward, in order to set aside as fraudulent certain voluntary conveyances of real estate made by the surety of his guardian. These deeds of gift were executed by Bryan Watkins in November, 1866, he being then liable as surety on the bond of William Long, who was guardian of Lunsford Long, a person *non compos mentis*. The lands were conveyed to the grantor's children, in consideration of natural love and affection, and the grantees at once entered into possession, and held the lands adversely from November, 1866, until March, 1879, when this bill was filed—a period of over twelve years:

Under this state of facts the chancellor, in our opinion, properly dismissed the bill. The case made by the bill was barred under the plea of the statute of limitations of ten years adverse possession by the defendants. This possession was adverse, open, notorious, uninterrupted, and accompanied with acts of ownership, and this completed the bar as against all the world, save only such persons as are exempted expressly from the operation of the statute by certain sections of the Code. In *Barclay v. Smith*, 66 Ala. 230, such a title was held to prevail against the title acquired by a purchaser at execution sale, although the action of ejectment was brought within ten years after the sale, and the lien of the execution was never lost. The principle there settled is conclusive of this case. It does not change the case that the right of the complainant to proceed against the guardian's surety arose within ten years before the commencement of this suit, as the purpose of the proceeding is not to obtain a personal judgment on the debt, nor is it a suit for the land. It is an effort to have the defendants, who are voluntary donees of the lands, declared trustees *in invitum*

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as to the lands conveyed to them by Bryan Watkins. Their adverse possession is a complete answer to this, it having matured by lapse of time into a good title. Any other doctrine than this might be perverted to unsettle a large proportion of land titles in the Commonwealth, and would be in derogation of the chief purpose of the statutes of limitation, which are designed to quiet litigation and give repose to titles.—*Lockard v. Nash*, 64 Ala. 385; *Smith v. Roberts*, 62 Ala. 83.

The decree of the chancellor is affirmed.

Hibbler v. Sprowl.

Bill in Equity to set aside Deed to Land as Fraudulent.

1. *Bill in equity; service on infant defendants; when erroneous.*—The mode for the service of summons to answer bills in equity issuing against infants, prescribed by the 23rd Rule of Chancery Practice, is exclusive of all other modes; and hence service on infant defendants personally, whose parents are living and not interested adversely to them, whether they are of tender years or have nearly attained their majority, is irregular; and the appointment of a guardian *ad litem* on such service is premature and erroneous.

2. *Same; when appointment of guardian ad litem erroneous under 26th Rule of Chancery Practice.*—Where a bill in equity, to which infants were made parties defendant, and which was verified by affidavit, avers the fact of infancy, but omits to state whether the infants were over or under the age of fourteen years, and no affidavit was filed stating the fact, the appointment of a guardian *ad litem* for them in such case is violative of the 26th Rule of Chancery Practice, and will not support a decree against them.

APPEAL from Pickens Chancery Court.

Heard before HON. A. W. DILLARD.

In 1874, Bird Ivey executed and delivered a deed of trust conveying a large body of lands situate in Pickens county, in this State, to a trustee therein named, to secure certain debts recited in the deed to have been owing by the grantor to James L. Hibbler. This deed contained a power of sale on default in the payment of the secured debts. In 1875, after the law-day designated in the deed, the trustee sold the lands conveyed by the deed under the power of sale contained therein, and at the sale Hibbler, the beneficiary, became the purchaser, to whom the trustee executed a deed, conveying to him the lands. Afterwards, in 1876, Hibbler executed a deed of gift conveying these lands to his children and grandchildren, therein named and designated, as tenants in common, among whom were Mary F.

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Windham, wife of Walter D. Windham, his daughter, and their children. The bill in this cause was filed by John M. Sprowl, a judgment creditor of Bird Ivey, against James L. Hibbler and his children and grandchildren, who are grantees under said deed executed by him, and others, seeking, among other things, to have the deed executed by the trustee to Hibbler, and the deed executed by the latter to his children and grandchildren set aside as fraudulent and void, and the lands sold for the payment of the complainant's judgment. The other facts necessary to an understanding of the opinion are stated therein. The chancellor, on the hearing, had upon the pleadings and proof, caused a decree to be entered granting the complainant relief, and from that decree this appeal was taken.

T. W. COLEMAN, M. L. STANSEL, E. MORGAN and WATTS & SONS, for appellants.

LEWIS M. STONE, and TERRY & JOHNSTON, *contra*.

BRICKELL, C. J.—The conveyance of the lands, made to his children and grandchildren by James L. Hibbler, constituted them tenants in common. The grandchildren were, of consequence, materially interested in the subject-matter, and necessary parties to the suit. As is shown by the bill, they were infants, residing with their parents. The 23rd Rule of Practice prescribes the mode in which summons issuing to them must be served, and is exclusive of all other modes of service. The parents being in life, service upon one of them for the infants must have been made. There is no authority for service upon them personally, whether of tender years or closely approaching majority. The children of Walter D. Windham were personally served—there was no service for them on either of the parents. It follows they were not regularly before the court; and the appointment of a guardian *ad litem* for them was premature and erroneous. For all the infant defendants a guardian *ad litem* was appointed, though the bill, verified by affidavit, averring their infancy, omits to state whether they were above or under the age of fourteen years, nor was an affidavit filed stating the fact. This was violative of the 26th Rule of Practice, a strict observance of which has always been required to support decrees against infants. These are errors compelling a reversal of the decree, and we do not deem it proper to consider any other of the assignments of error, as it may be necessary to retake the testimony so far as the infants are concerned. The adult defendants are doubtless concluded by the testimony already taken; but as the infant

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defendants are not, and may hereafter possibly present a different state of facts, we leave all other questions undetermined.

Reversed and remanded.

Taylor, Guardian *ad litem*, v. McCall, Adm'r.

Final Settlement of Decedent's Estate in Equity.

1. *Estate of decedent; when released from claim.*—Where an attorney, employed by an administrator to represent him on final settlement of his administration, gave to his client a receipt acknowledging payment of his fee for services rendered, although in fact the fee was not paid; and on such receipt as a voucher the administrator was allowed a credit on his settlement for the amount thereof, it must be conclusively presumed that the attorney thereby consented to look to the administrator alone for payment, and to discharge the estate and trust fund from all claim he ever had therefor.

2. *Settlement of administrator's accounts; what not a proper credit.* In such case, the attorney can not, by the voluntary, unsolicited act of the administrator *de bonis non*, obtain payment of his claim out of a balance which the estate owes to the administrator in chief, as ascertained by decree on his final settlement; and if the administrator *de bonis non* pay the claim, he can not be allowed credit therefor on the settlement of his administration.

APPEAL from Choctaw Chancery Court.

Heard before Hon. A. W. DILLARD.

Appeal by George W. Taylor, guardian *ad litem* of R. P. Roach, a minor, from a decree rendered by said Court of Chancery on the final settlement of E. McCall's administration upon the estate of Rozena Roach, deceased.

The opinion states the facts.

GEO. W. TAYLOR, for appellant. (No brief came to the hands of the reporter.)

WATTS & SONS, with whom were SPROTT & ALTMAN, *contra*. (1) It is shown that the services rendered by the attorneys were properly rendered to the administrator in chief, and the fee therefor had never in fact been paid by him. This fee was rightly paid by the administrator *de bonis non*, and he was properly allowed a credit therefor.—*Hearrin v. Savage, Adm'r*, 16 Ala. 286. (2) It appears clearly by the settlement made in 1874 by Roach, administrator, that the estate was indebted to him \$340, allowing the credit for the attorneys' fees; and if he

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had been allowed no credit therefor, the estate would have been indebted to him \$190. No injustice was done to the estate by the allowance of the fee.

STONE, J.—Only a part of the record of the chancery proceedings, had in this cause, has been brought before us, because only a single question is raised for our decision. Mrs. Rozena Roach had died, intestate we suppose, leaving some estate, and John D. Roach, her husband, became administrator in chief of her estate. He ceased to be administrator, and Ed. McCall was appointed administrator *de bonis non*. Roach made final settlement of his administration in the probate court, was debited with \$1,289.25, and credited with \$1,630.01; thus showing a balance of credits in his favor of \$340.76. The record does not inform us what decree was rendered on this settlement, or whether any decree was rendered for such ascertained balance, in his favor, or against any one. All parties appear to have acquiesced in that settlement. One item of credit allowed to Roach was for services rendered by attorneys, in that settlement, \$150. If this credit had not been allowed him, his balance of credits would have been about \$190. In that settlement, Roach filed, as a voucher, the receipt of the attorneys, acknowledging the payment to them of said fee of \$150. On this voucher he obtained the credit. The present record informs us that no part of this ascertained balance of \$340.76 has been paid to the administrator in chief.

Ed. McCall, the administrator *de bonis non*, made his settlement in the Chancery Court. In his account current he claimed a credit of \$150, paid said attorneys, for the the identical services they had rendered Roach in his final settlement, and for which he obtained a credit as above shown. This was objected to by the distributees. The attorneys testified, and doubtless correctly, that although they gave Roach a receipt for said \$150, as paid, he in fact paid them nothing, and was insolvent. The chancellor allowed this credit, and this ruling is assigned as error—the only error complained of.

Our rulings have been very uniform that services rendered to a trustee on his retainer, or by his procurement, are only a personal charge against the trustee, and confer no right to proceed against the trust fund in his hands. Paying such charges, if reasonable, just and proper, the trustee will be entitled to a credit in his settlement.—*Johnson v. Gaines*, 8 Ala. 791; *Savage v. Benham*, 11 Ala. 49; *Jones v. Dawson*, 19 Ala. 672; *Mulhall v. Williams*, 32 Ala. 489; *Pollard v. Cleaveland*, 43 Ala. 102; *Steele v. Steele*, 64 Ala. 438; *Dickinson v. Conniff*, 65 Ala. 581; *Kirkman v. Benham*, 28 Ala. 501. In *Haerrin v. Savage*, 16 Ala. 286, an administrator *de bonis non* was allowed a

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credit for reasonable fees of attorneys, who were retained *bona fide* by a former personal representative, to protect the interests of the estate. Of course, to justify such payment, it must be shown that the former administrator is not in arrears to the trust; for in no other case could the trust fund be so used. *Steele v. Steele*, 64 Ala. 438. In *Henderson v. Simmons*, 33 Ala. 291, it was ruled that the receipt of a creditor, acknowledging payment of a claim which was a proper charge against the estate, was a good voucher for the administrator in his settlement, although he had not in fact made payment. This was so ruled, because it was shown that, although the receipt was given, the matter was left open for adjustment on settlement of their private accounts. Now, this ruling can be vindicated only on one ground, namely: That by giving the receipt under the circumstances, the creditors discharged the estate, and agreed to look to and trust the personal credit of the administrator. See also *Harlin v. Bell*, 54 Ala. 389.

We are aware that in this case the record shows that the estate was indebted to the former administrator in a sum greater than the attorneys' fees, claimed to have been paid by the administrator *de bonis non*, amount to. It thus appears that the estate owes Roach, the first administrator, more than he owed the attorneys, and hence, the argument is made that the estate is nothing loser by the transaction. We think, however, another principle must control our ruling. When the attorneys gave Roach, the administrator in chief, a receipt acknowledging payment of their claim, they furnished him a voucher upon which he could obtain, and did obtain a credit in his settlement. This was a consent on their part to look to the administrator alone for payment, and to discharge the estate and trust fund from all claim they ever had therefor. We think, on the grounds of public policy, this presumption must be treated as conclusive, and not open to be rebutted by extrinsic proof. Such collateral investigation would frequently lead to delay, expense, and embarrassing complication, and we are not willing to enter upon an untried experiment, the first result of which would be the allowance to each of two successive administrators, a credit for one and the same disbursement. Many inconveniences, if not losses, might result from it, one of which would be the probable taxation of double commissions for one act of administration. If the attorneys have a claim against Roach, the first administrator, they must proceed against him personally. They can not, by the voluntary, unsolicited act of the administrator *de bonis non*, obtain payment out of the alleged balance the estate owes Roach. That is not the process by which one indebted can be made to pay the debt of his creditor.

[Rothe v. Bellingrath.]

For the error in allowing the administrator *de bonis non* credit for the attorneys' fees, discussed above, the decree of the chancellor is reversed and the cause remanded.

Rothe v. Bellingrath.

Statutory Action to enforce Mechanic's Lien.

1. *Mechanic's lien for improvements on rented premises; extent of.* Where buildings or other improvements are erected on leased or rented land, at the request, and on the exclusive credit of the lessee, the statutory lien of the contractor extends not only to such improvements and erections as may be constructed by him, but also to the unexpired leasehold term of the premises on which the improvements are made, not exceeding one acre.

2. *Same.*—While the statute also extends such lien to the materials furnished, this involves the necessary implication that the materials must be capable of practical identification, when the lien is sought to be enforced specifically on them; and hence, where the materials are furnished to a lessee and are by him used in repairs on the rented premises, and are so merged in the freehold as to be incapable of severance, the contractor or material-man has no lien thereon, but merely a lien on the leasehold estate.

3. *Same; taken subject to conditions in lease.*—Where the lien attaches to a leasehold interest, it is subject to all the conditions of the lease; and where the lease has been forfeited, the holder of the lien must pay to the lessor "all arrears of rent, or other money, interest and costs due under the lease," before he can acquire the rights of the lessee thereunder, even by purchase.

4. *Rule of common law as to repairs on leased premises; statute to be construed in harmony therewith.*—At common law the burden of repairs was always cast on the tenant, and the landlord was under no implied obligation to keep the rented premises in repair; and the statute providing a lien in favor of mechanics and material-men for improvements erected on rented lands (Code of 1876, § 3443), must be construed in harmony with this principle, so far as its letter will permit.

5. *When evidence of the amount due under the lease for rent or damages inadmissible.*—In a proceeding under the statute to enforce the statutory lien in favor of a material-man for materials furnished under a contract with the lessee, against the leasehold estate, the amount of the rent due the lessor by the lessee, or of any other moneys or damages accruing under the lease, is not a material issue; and hence, testimony tending to show that fact is immaterial and inadmissible on the trial, although it may become material after judgment in favor of the plaintiff, and a purchase of the leasehold estate thereunder.

6. *When lessee not the agent of the lessor.*—Where the lessee is authorized, by the terms of the lease, to erect improvements on the rented premises on his own credit and at his own expense, which are to become the property of the lessor at the termination of the lease, the value thereof to be paid by him in money, or be deducted from rent then due, this does not constitute the lessee the agent of the lessor for the erection of such improvements, nor does it impose on the lessor the duty or obligation to pay therefor.

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APPEAL from City Court of Montgomery.

Tried before Hon. J. A. MINNIS.

This was an action commenced under the statute by F. W. Rothe against H. Bellingrath, John N. Murphy and John Wilson, to enforce a mechanic's lien for materials and machinery alleged to have been furnished by the plaintiff under a contract with the defendant Bellingrath, for a mill which had been leased by the latter from the defendant Wilson. The complaint contains two counts. In the first count it is averred that the defendant Murphy had "some interest in the subject-matter of this controversy, the precise nature of which to plaintiff is unknown;" and that the defendant Wilson is the owner in fee of the mill and land on which it is erected, and that the defendant Bellingrath holds the same under some contract of lease, the precise terms of which are unknown to plaintiff. In the second count it is averred that Bellingrath was authorized by Wilson "to have said machinery put up, and said materials furnished for said mill and on said land; and that said Bellingrath, in making said contract and causing said machinery to be put up, and said materials to be furnished, was the agent of said Wilson, and acted for him and in his behalf;" and that "said machinery was put up and said materials were furnished with the knowledge and consent of said Wilson," and for the immediate benefit of all the defendants. It is also averred in this count, that the defendant Murphy has some interest in the subject-matter of the controversy, the precise nature of which is unknown to the plaintiff. No other part of the pleadings is set out in the record.

The evidence introduced on the trial showed, that on 1st February, 1878, the defendant Wilson, by contract in writing, leased to the defendant Bellingrath the mill (a steam grist mill), described in the complaint, for one year, with the privilege of renewing the lease for three years, at an annual rent of \$700, payable quarterly, Wilson reserving the right to terminate the lease and to re-enter upon default in the payment of the rent as stipulated in the contract, and Bellingrath agreeing to keep the mill in operation and in good working condition. After providing that Bellingrath should have the privilege of erecting and carrying on a steam ginney near the mill, and of making other improvements, it is stipulated in the lease that "all the improvements so erected by the said Bellingrath and remaining at the expiration of this lease, are then to belong to the said John Wilson," the value thereof, as ascertained by three disinterested persons, to be paid for by him, or to be deducted from the rent then due and unpaid. It was further shown by the evidence, that Bellingrath having taken possession of the mill property on 1st February, 1878, the plaintiff,

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knowing that he had rented the property, but not knowing the terms of the lease, under a contract made on that day with Bellingrath, furnished him certain machinery and materials for use in improvements in and upon the mill, which were afterwards so used, the improvements having been put upon the building known as the "mill-house" by another at Bellingrath's expense, and affixed to the soil; that no contract was made with Wilson in reference to the articles so furnished, but he knew the use to which they were put; that the improvements were needed, and the price charged therefor was reasonable; that there was due the plaintiff on account of said materials and machinery, a balance of \$407.34, with interest; that the defendant Murphy was interested in the lease with Bellingrath; that the mill was operated about four months under the lease, and was then abandoned, and that on 1st November, 1878, after this suit was commenced, Wilson took possession of it again; and that the plaintiff, not having been paid for the machinery and materials furnished by him, duly filed in the office of the judge of probate of Montgomery county, the county in which the property was situated, his claim therefor, as required by the statute.

On the trial the defendant Wilson was allowed by the court, against the plaintiff's objection, to read to the jury a letter written by the plaintiff to said defendant, "introducing defendant Bellingrath" to him, and the plaintiff excepted. The defendant Wilson was also allowed to prove, against the plaintiff's objection, that Bellingrath owed him for the rent of the mill property from 1st February, 1878, to 1st November, 1878, amounting, with interest, to about \$700, and the plaintiff excepted. The defendant Wilson, was also allowed by the court, against plaintiff's objection, to introduce evidence tending to show that the defendant Bellingrath had damaged the mill about \$300, by carelessly and negligently running it, and the plaintiff excepted. The evidence for the defendant Wilson further tended to show that the said improvements so placed upon the mill were not such as were authorized by the contract of lease.

The foregoing being the substance of the material parts of the evidence bearing on the questions reserved for the consideration of this court, the Circuit Court charged the jury, *ex mero motu*, among other things, "that if they believed from the evidence in this case, that the rent due and unpaid to Wilson, and the damages to the mill by the lessee were greater than the value of the improvements, materials furnished, etc., placed there by plaintiff, then the plaintiff can not recover in this case, and they should find for the defendants." To this charge the plaintiffs excepted. The court refused to give to the jury

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the following charge, among others requested in writing by the plaintiff, and he excepted, to-wit: "4. If the jury find from the evidence that Wilson authorized Bellingrath to have the machinery put up, and that the plaintiff did put it up, then they must find that the plaintiff has a lien on the whole property."

The plaintiff was compelled to take a non-suit in consequence of the adverse rulings of the Circuit Court. The rulings above noted are among the assignments of error here made.

LESTER C. SMITH and THOMAS H. CLARK, for appellant. (1) The plaintiff's lien not only included the materials and machinery furnished, but also the leasehold term; and in the event of a forfeiture of the lease the purchaser "shall be held to be the assignee of such leasehold term," and may pay up the rent, etc., and continue as lessee.—Code of 1876, §§ 3442, 3443. (2) But under the lease Bellingrath was authorized to have the improvements made, and Wilson was to pay him for them at the end of the term. This constituted Bellingrath the agent of Wilson for that purpose.—Phillips on Mechanic's Lien, § 90; *Woodward v. Leiby*, 36 Penn. St. (12 Casey), 437. The plaintiff, therefore, had a lien, not only on the leasehold estate, but also on the fee. (3) Under the statute the lien is inchoate until the statutory requirements are complied with; but when they are complied with the lien becomes perfect, and relates back to the beginning of the work.—*Welch v. Porter*, 63 Ala. 225. The lien was, therefore, perfect before Bellingrath owed Wilson anything for rent, or had damaged the machinery by carelessness in running it; and it was not affected by the forfeiture of the lease.—See Phillips on Mechanics' Lien, § 192; *Gaskill v. Trainer*, 3 Cal. 334; *Montandon v. Deas*, 14 Ala. 33; *König v. Mueller*, 39 Mo. 165.

RICE & WILEY and CLOPTON, HERBERT & CHAMBERS, *contra*. (No brief came to the hands of the reporter.)

SOMERVILLE, J.—Under the provisions of the present Code, a mechanic's lien, whether for work and labor done, or for materials furnished, is binding "only to the extent of all the right, title and interest owned therein by the *owner* or *proprietor* of such building, erection or other improvement [as may be constructed by contract for any person] for whose *immediate* use or benefit the labor was done or things were furnished."—Code, 1876, § 3441.

Where buildings or other improvements are erected on *leased* or *rented* lands, at the request and on the exclusive credit of the lessee, the contractor's lien is extended by the statute, not

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only to such improvements and erections as may be constructed by him, but also to the unexpired leasehold term of the lot or land, not exceeding one acre, on which the improvements are made.—Code, §§ 3440, 3443. It is also made to fasten on the fixtures or materials furnished. But this must, of course, involve the necessary implication, that these materials, in order to authorize the enforcement of such lien on them *specifically*, must be capable of practical identification. This can not be, where they are used merely for *repairs* and are so merged in the freehold as to be incapable of severance.

It never was intended, however, that the lessee should have power to bind the interest of the lessor. He can only bind the improvements or erections which are capable of both identification and practical severance, and the leasehold estate. But when the lien attaches to the leasehold interest, it is subject to all the conditions of the lease. And where the lease has been forfeited, the holder of such lien, before he can be placed in the shoes of the lessee, even by becoming the purchaser of the leasehold term and the improvements, must *first* pay to the lessor "all arrears of rent, or other money, interest and costs due under the lease."—Code, § 3443; Phillips on Mech. Lien, § 192, § 90. At common law the burden of repairs was always cast on the tenant, and the landlord was under no implied obligation to keep rented premises in repair. The statute must be construed in harmony with this principle, so far as its letter will permit.—Phil. on Mech. Lien, § 90.

Where the cardinal facts are established, bringing a case within the purview of the statute, the only further issues required to be submitted to the jury are, the *amount* of the debt claimed, and the *description* of the particular property sought to be charged with a lien for its satisfaction.—Code, §§ 3451–52.

It is thus clearly evident that the amount of the rent due the lessor by the lessee, or that of any other moneys or damages accruing under the lease, is not a material issue on the trial for the enforcement of a mechanic's lien under the statute. It may become material, however, after the rendition of a judgment in favor of a plaintiff, where, in seeking to enforce such judgment, he becomes the *purchaser* of the leasehold estate, or where a third person purchases such interest of the lessee. The purchaser at such sale takes the estate *cum onere*—subject to these claims of the lessor—and hence their relevancy after sale made under execution on the judgment.—Code, § 3443. The court below, therefore, erred in permitting evidence to be introduced, showing the amount of rent due by Bellingrath to Wilson, and also in admitting evidence of the damage alleged to have been done by the lessee's carelessness in running the

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mill. These facts were irrelevant and should have been excluded.

There was no evidence tending to show that Bellingrath was the *agent* of Wilson, and no such relationship can be implied from that of landlord and tenant. He was merely authorized by Wilson to put up certain improvements, on his own credit and at his own expense. The agreement that the lessee should be re-imbursed for them, by deducting their valuation from rents, does not change the case. It was rather a negation of the fact of agency than otherwise.—*Mills v. Matthews*, 7 Md. 315; *McCarty v. Carter*, 49 Ill. 53; Phil. on Mech. Lien, § 89. The fourth charge was, for these reasons, properly refused.

The letter written by the plaintiff to Wilson, and introducing Bellingrath, was improperly admitted in evidence. It had no legitimate bearing on the issues submitted to the jury and was irrelevant.

Reversed and remanded.

Beard v. The Union & American Publishing Company.

Action against Surety on Agent's Bond.

1. *Section 4 of Art. 14 of constitution construed.*—Soliciting and receiving subscriptions for a newspaper published in another State by a corporation, is not doing "business" in this State, within the meaning of section 4, Art. 14, of the constitution, prohibiting foreign corporations from doing any business in this State without having at least one known place of business, and an authorized agent or agents therein.

2. *Set-off by surety of debt due principal; when not available.*—Sureties, when sued alone, can not, without the consent of their principal, avail themselves, by way of set-off, of a debt due from the plaintiff to the principal at the commencement of the suit.

APPEAL from Marshall Circuit Court.

Tried before Hon. LE ROY F. BOX.

This action was commenced on 27th March, 1879; was brought by the Union and American Publishing Company, a body corporate created and existing under the laws of the State of Tennessee, the appellee, against James P. Beard and others, the appellants, and was founded on a bond executed by them, by which they covenanted and agreed "to pay to the proprietors of the American, a newspaper published in the city of Nashville, Tennessee, all damages which they may sustain by

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the default, dereliction or failure of J. L. Burke as a general agent for said newspaper, to make, after a deduction of 10 *per centum* commissions, semi-monthly, or at least monthly remittances to the said proprietors of the said American of all moneys which he may collect for subscriptions, or otherwise, to the said American, so long as he may act as agent for same." Burke did not execute the bond and he was not a party defendant to the suit. A breach of the bond was duly averred and the plaintiff claimed the sum of \$78.70 as due thereon. The defendant filed two pleas, setting up, in substance, that the cause of action declared on was founded upon and grew out of business done by plaintiff in this State, and that at the time such business was done, said plaintiff was a foreign corporation, and then had no known place of business in this State. A demurrer to the plea having been overruled, the cause was tried on issue joined thereon, the trial resulting in a verdict and judgment for the plaintiff.

The plaintiff's evidence tended to show that the plaintiff was the proprietor of the newspaper mentioned in the bond; that on the faith of the bond Burke was appointed plaintiff's agent to solicit and receive subscriptions for said newspaper, and that under the appointment he did solicit and receive subscriptions for said paper "in and out of Marshall county, Alabama, up and down the Tennessee valley, along the line of the South & North Alabama railroad and the Alabama and Chattanooga railroad, by approaching persons wherever he found them, both along said lines, and routes, and also on the streets and in the houses in Guntersville;" that of the money so received for subscriptions he failed to remit a stated amount; and that while acting as plaintiff's agent, Burke, with his family, resided at Guntersville, Alabama, and he caused an advertisement to be inserted in a newspaper published in said town, that he was plaintiff's agent for the purpose of soliciting and receiving said subscriptions, at Guntersville. Burke was examined as a witness for defendants, and his testimony tended to show, that while he was acting as agent for plaintiff, he had no place of business in Guntersville or elsewhere; and that the plaintiff was indebted to him for services rendered by him, at its instance and request, as special correspondent for plaintiff's newspaper, in a stated amount, which exceeded that which the plaintiff claimed in this cause. But no testimony was offered tending to show that Burke consented that the defendants might use this amount as a set-off.

At the plaintiff's request in writing, the court instructed the jury (1) as to what constituted a known place of business within the meaning of section 4 of Art. 14 of the constitution; and (2), in substance, that Burke was not sued in this action, and to

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authorize the defendants to set off what the plaintiff owed him, he must have consented thereto, and the jury were not allowed to assume that he had consented, but such consent must be shown by the evidence. To each of these charges the defendants excepted, and here assign them as error.

HARVILL & DICKENSON, for appellants.

ROBINSON & BROWN, *contra*.

STONE, J.—Section 4, Article 14, of the constitution has no bearing on the question raised in this case. Receiving subscriptions to a newspaper, or collecting the money therefor, although the paper is published in another State, and by a corporation, is not doing “business” in this State, within that section of the constitution. There must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created, to bring the case within that clause. A railroad, bank, or insurance company, of foreign incorporation, performing its corporate functions within the limits of Alabama, would be required to keep “at least one known place of business, and an authorized agent or agents” in this State. That would be doing business; the business, or a part of it, which falls directly within the purview of their corporate powers. The present case does not fall within the principle.

There is no plea of set-off in this record, and if there were such plea, the evidence fails to show any authority in the defendants to avail themselves of it.—*Bowen v. Snell*, 9 Ala. 481; S. C. 11 Ala. 379; Code of 1876, § 2994.

Affirmed.

Cooper v. Hornsby.

Bill in Equity by Mortgagor to Redeem Lands Sold under Power of Sale.

1. *Redemption of lands by mortgagor; within what time allowed.*—An offer by a mortgagor to redeem lands sold under a power of sale contained in the mortgage, whether made by bill or otherwise, must be made within two years from the date of sale, unless the mortgagee was the purchaser; in that event a bill to set aside the sale and to redeem may be filed within a reasonable time, to be determined by the circumstances of each particular case.

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2. *Parol sale of land under power contained in mortgage; mortgagor can not complain of.*—A mortgagor can not complain that a parol sale of lands by the mortgagee under a power contained in the mortgage is void, because it was not evidenced by writing as required by the statute of frauds. The benefit of this statute is not available without being specially pleaded, and if waived, and the contract is admitted or satisfactorily proved, it will be enforced.

3. *Same; equity of redemption cut off by.*—Such a sale is obligatory on the parties and valid so long as they treat it as binding, and it operates to cut off the mortgagor's equity of redemption, leaving in him merely the statutory right to redeem, which can only be asserted within two years from the date of the sale.

4. *Sale of lands under power contained in mortgage; payment of purchase-money.*—Whether a purchaser of lands under a power contained in a mortgage paid the purchase-money in lawful currency, or by a debt due him from the mortgagee, is a matter resting exclusively with them, with which the mortgagor is in no way concerned.

APPEAL from Elmore Chancery Court.

Heard before HON. CHARLES TURNER.

The bill in this cause was filed on 24th August, 1875, by John Cooper against Elizabeth Hornsby and others, the widow and heirs at law of Leonard A. Hornsby, deceased, seeking to redeem certain lands which were sold under a power contained in a mortgage executed by Cooper to the said Leonard A. Hornsby, deceased. It appears from the record, that on 28th November, 1870, John Cooper, being indebted to Leonard A. Hornsby, executed to him a mortgage on the lands sought to be redeemed with a power of sale, to secure such indebtedness. The law-day of the mortgage was 1st November, 1871. Default having been made in the payment of the debt, the mortgagee sold the lands conveyed by the mortgage on 16th December, 1871. The bill charges that at the sale Leonard A. Hornsby purchased the lands, and immediately went into the possession thereof under his purchase, and that he and his heirs have ever since been in possession, and that the rental value of the lands was more than sufficient to pay off and satisfy the mortgage debt. The bill avers that there had been no administration upon the estate of Leonard Hornsby, deceased. The defendants answered, admitting the execution of the mortgage and the sale thereunder, but denying that their ancestor purchased the lands at said sale, averring that one William Golden became the purchaser thereof. The theory of the defense on this point was, that Golden paid for the lands by crediting the purchase-money on a debt which Hornsby owed him, and that afterwards Hornsby purchased the lands from Golden, paying him therefor. The conclusion of this court on this disputed question of fact is stated in the opinion, and it would serve no good purpose to set out the evidence bearing on it. No deed was made by Hornsby to Golden, or afterwards by Golden to Hornsby. Before final decree the complainant died, and the

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cause was revived in the names of an administrator *ad litem* appointed by the court, and of John T. Cooper and others as the heirs at law of the said John Cooper, deceased.

On final hearing, had upon the pleadings and proof, the Chancery Court entered a decree dismissing the bill, and that decree is here assigned as error.

J. M. FALKNER, for appellant.

SUTTLE & KYLE, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—Where a bill to redeem is filed by a mortgagor, the time within which it should be filed depends upon the character of the particular case.

Where there has been no sale or foreclosure by the mortgagee, the suit may generally be commenced at any time within which a statutory bar would not accrue, which, in cases of real estate, is ten years.—*Coyle v. Wilkins*, 57 Ala. 108.

Where the mortgagee has made a sale under a power contained in the mortgage, and has become the purchaser at his own sale, a bill to set aside the sale and redeem may be filed within a *reasonable time*, to be determined by the circumstances of each particular case.—*Robinson v. Cullom & Co.*, 41 Ala. 693.

In cases where two or more mortgages have been given on the same property, and the first or prior ones have been foreclosed, without making the second or junior mortgagee a party, the latter may file a bill to redeem at any time while his mortgage is operative, not exceeding the statutory limitation of five years.—Code, 1876, § 3227; *Wiley v. Ewing*, 47 Ala. 418.

Where, however, there has been a foreclosure under or by virtue of a decree in chancery, or under power of sale conferred in the mortgage, the offer to redeem by the debtor, whether made by bill or otherwise, must come within two years from the date of sale. This is under the provisions of the statute, as found in section 2877 of the present Code.

One of the first questions presented for determination by the record in this case is, whether Hornsby, the mortgagee, was the real and true purchaser at his own sale, made on December 16, 1871, or whether Golden purchased *bona fide* for himself, and re-sold to Hornsby without previous collusion or prearrangement. If he acted as the agent of Hornsby, the purchase made by him may be avoided by seasonable dissent. If not, the sale would cut off the mortgagor's equity of redemp-

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tion, and the offer to redeem would be barred after the lapse of two years.

The weight of the testimony, we think, after a careful examination of it, favors the view that Golden bought the mortgaged land for himself, and that he re-sold it to the mortgagee.

It is true that no deeds were executed between the parties, but this was material only as affecting the legal title to the lands in question, which could be divested only by the execution and delivery of a conveyance in writing.—2 Jones on Mortg. § 1894; *Graham v. Newman*, 21 Ala. 497. It may be conceded that the purchaser could not have sustained an action of ejectment at law on such a title.—*Jackson v. Scott*, 67 Ala. 99. The purchase by Golden, however, gave him a right to compel the mortgagee, by specific performance, to convey to him. Whether he settled the purchase-money in lawful currency, or by a debt due him from the mortgagee, was a matter resting exclusively with them, and with which the mortgagor, Cooper, had no concern. Nor could third parties complain that these transactions were void under the statute of frauds, because not evidenced by writing. The benefit of this statute is not available without its being specially pleaded, and if waived, and the contract is admitted, or satisfactorily proved, it will be enforced. Such agreements are, therefore, not strictly void, but voidable merely.—*Houston v. Hilton*, 67 Ala. 374; *Patterson v. Ware*, 10 Ala. 444; *Gillespie v. Battle*, 15 Ala. 276. And where there is a past execution of a parol agreement to sell lands by delivery of possession to the vendee, and payment of a portion of the purchase-money, the statute of frauds has no application.—Code, § 2121; *Brewer v. Brewer*, 19 Ala. 481.

The sale made under the power by Hornsby to Golden, being obligatory on the parties and valid so long as they treated it as a binding agreement, it operated to cut off the equity of redemption of the mortgagor, Cooper, and reduced it to a mere statutory right of redemption. This could be asserted at any time within two years from the date of sale. The bill in this case, having been filed after the lapse of this period, was without equity, and was properly dismissed. The decree of the chancellor must therefore be affirmed.

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Bill in Equity by Married Woman to have cancelled Deed conveying Land, her Statutory Separate Estate, in payment of Husband's Debt.

1. *Rule on appeal, where bill is dismissed.*—If the chancellor dismisses complainant's bill, either assigning no reason, or placing the decree on a ground which is untenable, then the rule of this court, on appeal, is, to inquire whether the bill contains equity. If it be substantially wanting in equity, the decree will be affirmed, because it is right, though based on a wrong reason or ground; but if the bill contains defects which are amendable, and which were not pointed out by the ruling of the lower court, this court will reverse and remand, noting the defect, that the complainant may have the opportunity to amend.

2. *Bill by married woman out of possession, to have cancelled conveyance of her statutory separate estate; when contains equity.*—Where a married woman joined her husband in the execution of a deed of trust conveying lands belonging to her, as her statutory separate estate, to secure her husband's debt, and afterwards, under an agreement of compromise and settlement of the debt and the asserted liability of the lands for the payment thereof, she and her husband executed an absolute deed, reciting the agreement of compromise and settlement, and conveying to the creditor a portion of the lands covered by the deed of trust, and the evidence of the debt was given up to the husband, and the deed of trust cancelled; and afterwards the creditor sold and conveyed the lands conveyed by the last deed to another, who took possession, claiming title under his deed,—*held*, that the wife could maintain a bill in equity against the creditor and purchaser from him, to have the deed, executed by herself and husband under the agreement of compromise and settlement, cancelled, although she was out of, and the purchaser in possession of the lands. (*Boyleston v. Farrior*, 64 Ala, 564, re-affirmed and followed.)

3. *Same; rents can not be recovered.*—In such suit rents can not be recovered by the wife, as they are payable under the statute to the husband. (BRICKELL, C. J., dissenting.)

APPEAL from Marengo Chancery Court.

Heard before HON. THOMAS COBBS.

The bill in this cause was filed on 3d July, 1875, by Arabela C. Prince, a married woman, by her next friend, against A. C. Hargrove and H. C. Vaughan, as the administrators of E. B. Vaughan, deceased, J. S. Ryall, and John H. Prince, the complainant's husband; and the case made thereby is substantially as follows: The complainant being seized of a tract of land in Marengo county, devised to her by her father, and held by her as her statutory separate estate, and her husband

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being seized and possessed of another tract in said county, which he had purchased from one Glover with moneys, as was claimed by complainant, belonging to her statutory separate estate, they jointly executed, in 1860, a deed of trust conveying both tracts to a trustee, to secure the sum of \$10,000, which the complainant's husband had borrowed from one E. B. Vaughan, the deed containing a power of sale on default in the payment of the debt. The trustee died in 1863, and no successor in the trust was afterwards appointed. E. B. Vaughan died in 1866 or 1867, and A. C. Hargrove and H. C. Vaughan were appointed administrators of his estate. After default, and after the administrators had taken steps to have the lands sold under the power contained in the deed, an agreement of compromise and settlement was made by the parties, the administrators acting under authority conferred by the probate court, by which the complainant and her husband agreed to convey the Glover tract and a stated portion of the other tract, and in consideration thereof the administrators agreed to give up to John H. Prince his note, and to cancel said deed of trust. And on 18th February, 1869, in pursuance of that agreement a deed was executed by the complainant and her husband conveying to the administrators the lands which they agreed to convey. This deed is made an exhibit to the bill, and recites the agreement of compromise and settlement. Afterwards the administrators sold and conveyed the lands to the defendant Ryall, who was in possession, claiming title under the deed executed by the administrators, when the bill was filed. The prayer of the bill is, that the husband be required to convey to the complainant the Glover tract; that the administrators be required to cancel and surrender the deed executed to them by the complainant and her husband, and that the defendant Ryall be required to surrender to complainant said lands and to account for the rents and profits thereof while he was in possession.

On the first hearing, had on pleadings and proof, a decree was entered dismissing the bill; but on appeal to this court that decree was reversed and the cause remanded. See *Prince v. Prince*, 67 Ala, 565. After the cause was remanded, it was again heard on pleadings and proof and also on a motion to dismiss for want of equity; and upon this hearing the Chancery Court entered a decree overruling the motion to dismiss for want of equity, granting the complainant relief as to all the lands conveyed by them to the administrators, except the Glover tract, declaring her entitled to the rents thereof for one year before the commencement of the suit, less the value of permanent improvements placed on said lands by Ryall, and ordering a reference to ascertain the value thereof. The ruling of

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the Chancery Court on the motion to dismiss, and decreeing of rents to complainant are here assigned as error.

GEO. H. LYON, for appellant.—(1) The first decree dismissing the bill was “on the merits,” and the complainant having taken the first appeal, she, of course, could not assign as error, or insist in argument, that her bill was wanting in equity. The question raised on the motion to dismiss was not, therefore, before this court on the former appeal.—Code of 1876, § 3158; *Watson v. Knight*, 44 Ala. 352; *Carlin v. Jones*, 55 Ala. 629; *Bobee v. Stickney*, 36 Ala. 482. Not having been passed on, it was *res integra*, and could be made afterwards “at any stage of the cause.”—76 Rule of Chancery Practice. (2) On the former appeal in this case it was held that the legal title in all the lands in controversy, except the Glover tract, was in the complainant as her statutory separate estate; that the mortgage of these lands was a *nullity*, the compromise without consideration, and the attempted conveyance of them by deed passed no title to Vaughan’s administrators, and that the title to the Glover tract was in Prince, and not in his wife, and of that tract the defendants were *bona fide* purchasers without notice of Mrs. Prince’s latent equity. The averments of the bill show that Mrs. Prince was out of, and the defendant Ryall in possession; and no ground is averred showing that a court of law is inadequate to give the complainant the relief she seeks, but, on the contrary, all the averments clearly show that she has a complete and adequate remedy at law. The motion to dismiss should have, therefore, been sustained.—*Daniel v. Stewart*, 55 Ala. 280; *Plant v. Barclay*, 56 Ala. 563. (3) Again, the invalidity of the deeds appears on their face, and they are made exhibits to the bill. The question of their validity could have, therefore, been passed upon by a court of law.—*Garrett v. Lehman, Durr & Co.*, 61 Ala. 391. They do not present such a cloud on the title as will justify the interposition of a court of equity.—*Tyson v. Brown*, 64 Ala. 244. (4) As to the Glover tract the bill is without equity, because no facts are averred showing knowledge, on the defendants’ part, of complainant’s equity, or such information as would charge them with notice. *Shepherd v. Shaefer*, 45 Ala. 233; *Dixon v. Brown*, 53 Ala. 428. (5) In the case of *Boyleston v. Farrior*, 64 Ala. 564, and the cases referred to in that opinion, the facts are materially different from the facts in this case. In all the former cases the facts show that the complainants and their husbands made deeds that were absolute on their faces, and “were capable of being used as instruments of vexatious litigation; and the lapse of time would endanger the means of defense against them, if rights under them should be asserted.” And in *Boyleston v.*

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Farrior, it is alleged that the mortgage complained of by her was made by her and her husband, and recites *on its face* that it was given to secure the debt of the *husband and wife*, which can be done in some cases, as where the secured debt is for the purchase-money of lands conveyed to the wife. *Strong v. Waddell*, 56 Ala. 471. (6) The complainant's husband was entitled to the rents, and not the wife; and the deed to Vaughan's administrators containing covenants of warranty, the rents passed thereby to them, and from them to Ryall by the subsequent deed.—Code of 1876, § 2706; *Bennett v. Bennett*, 34 Ala. 53; *Weems v. Bryan*, 21 Ala. 302; 25 Ala. 198; *Whitman v. Abernathy*, 33 Ala. 160; *Bishop v. Blair*, 36 Ala. 85; *Warfield v. Raviesies*, 38 Ala. 523; *Lee v. Tannenbaum*, 62 Ala. 501.

J. T. JONES, *contra*. (1) The equity of the bill was substantially passed on by this court on former appeal, when it was held that the "complainant was entitled to relief." Therefore, under 76 Rule of Chancery Practice, the motion to dismiss could not again be considered. See *Taylor v. Harwell*, 54 Ala. 596. (2) But the right of the complainant to file and maintain the bill, is no longer an open question. It was settled in *Boyleston v. Farrior*, 64 Ala. 564, where it is distinctly held, that "a married woman having executed a conveyance or mortgage to secure the debt of her husband, may come into equity to have it set aside and cancelled, without averring fraud, duress, or improvidence in the transaction." (3) Under the provisions of the Code, in suits relating to the wife's statutory separate estate, she must sue alone, where the suit is for the *corpus*; and where the rents, incomes and profits are *the mere incidents* of a suit for the *corpus*, and not the foundation of the suit, she may recover them.—*Pickens v. Oliver*, 29 Ala. 528.

STONE, J.—On the first submission of this cause in the Chancery Court, the chancellor dismissed the bill on the merits, holding that the conveyance executed by Prince and wife to Hargrove passed a good title; and that Ryall, having purchased that title, himself had a good title. On appeal to this court the decree of the chancellor was reversed, and the cause remanded. We held that the complainant, Mrs. Prince, was entitled to relief as to all the lands, except one hundred and sixty acres, the title to which had been in John H. Prince, her husband. This one hundred and sixty acres may be styled the Glover purchase. As we have said, we remanded the cause for further proceedings therein. There was a demurrer to the bill as filed, and also a motion to dismiss for want of equity. The particular ground of the motion to dismiss was, that Mrs. Prince, according to the averments of her bill, had a complete

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and adequate remedy at law, and, therefore, her bill ought to have been dismissed. On the return of the case to the Chancery Court, after the reversal here, the motion to dismiss for want of equity was again pressed upon the chancellor, and being overruled by him, it is here assigned as error; and we are asked now to dismiss the bill, because, as to all the lands except the Glover purchase, Mrs. Prince had a plain and adequate remedy at law. We have declared that Mrs. Prince is entitled to no relief as to the land bought of Glover; and as to all the other lands, she is entitled to relief.—*Prince v. Prince*, 67 Ala. 565.

It is contended for appellant that when this case was before in this court, the only errors which were or could be assigned were in behalf of Mrs. Prince, because she alone appealed, and would not contend that her bill was wanting in equity. On this ground it is here contended that the question of the equity of the bill was not, and could not then be considered. This is, to some extent, a misapprehension of the rule in such cases. The question depends on the ruling in the court below, whether granting or denying relief to the extent claimed, and, also, on another question, to be presently considered. If the chancellor below refuses relief, and dismisses complainant's bill, either assigning no reason, or placing his decree on a ground which is untenable, then our rule is to inquire whether the bill contains equity. If it be substantially wanting in equity—a non-amendable defect—we affirm the decree, holding that the judgment is right, but placed on a wrong reason or ground. If there be a defect in the bill which is amendable—such as want of parties, the incorporation of improper parties, or a variance between the allegations and proof—we reverse and remand, noting the defect, that the complainant may have an opportunity to amend in the court below. This privilege is not extended, however, if by a ruling in the court below, made either on motion or demurrer, the defect has been pointed out, and the complainant made no offer to amend.—*Bobe v. Stickney*, 36 Ala. 482; *State v. Rice*, 65 Ala. 83; *Gibbs v. Hodge*, *Ib.* 366; *Smith v. Connor*, *Ib.* 371; *McDonald v. McMahon*, 66 Ala. 115; *Sims v. Sampey*, 64 Ala. 230.

Applying these principles to this case, if, when the case was before us at the last term—*Prince v. Prince*, 67 Ala. 565—we had thought Mrs. Prince had a complete and adequate remedy at law, we would neither have reversed nor remanded the cause. The bill being without equity, and not amendable, the case would have presented the familiar principle of a judgment announcing the proper result, but for a wrong reason. Our judgment in that cause, reversing and remanding, was itself an affirmation that the bill contained no incurable defect, and that

[McNeil et al. v. The State of Ala. ; Skinner et al. v. The State of Ala.] the motion now pressed is without merit. We follow the ruling in *Boyleston v. Farrior*, 64. Ala. 564, and hold that Mrs. Prince's bill is not without equity.

In decreeing rents to complainant, the chancellor erred. She can not recover them, as they were and are payable to her husband.—*Whitman v. Abernathy*, 33 Ala. 160; *Lee v. Tannenbaum*, 62 Ala. 501.

The decree of the chancellor is reversed and here rendered, decreeing to her the lands which the chancellor awarded to her, and withholding relief as to rents. The defendants below will pay the costs of the original suit, and the appellee and her next friend must pay the costs of appeal.

BRICKELL, C. J. *dissenting*.—The purpose of this suit was the recovery of lands, the statutory separate estate of the complainant. The recovery of rents and profits was a mere incident; as essentially an incident as the recovery of mesne profits in an action of ejectment, or in a statutory real action. When the recovery of rents and profits is a mere incident of a suit by the wife for the recovery of the *corpus* of her statutory separate estate, she is entitled to recover them.—*Pickens v. Oliver*, 29 Ala. 528.

McNeil et al. v. The State of Alabama ; Skinner et al. v. The State of Alabama.

Actions against Tax Collector and Sureties on Official Bond.

1. *When demurrer waived*.—When a demurrer to a complaint does not appear from the record to have been called to the attention of the lower court, or any action whatever taken thereon, it will be presumed, on appeal, to have been waived.

2. *Judgment by consent; what is*.—A recital in a judgment-entry, that the parties came by their attorneys, and by consent of defendants, the judgment was rendered against them, shows that the defendants, and not their attorneys, consented to the rendition of the judgment.

3. *Same; a release of errors*.—Such a judgment operates a release of errors, and the consent upon which it is founded can not afterwards be withdrawn, and the judgment reversed at the instance of the defendants.

APPEAL from Marengo Circuit Court.

Tried before HON. HARRY T. TOULMIN.

These suits were founded on two official bonds of M. H. McNeil, as tax collector of Marengo county, and were brought by the State against him and the sureties on each of said bonds.

[McNeil et al. v. The State of Ala.; Skinner et al. v. The State of Ala.]

In each case the complaint and a demurrer filed thereto are the only pleadings contained in the record. On the day the demurrers were filed, a judgment was rendered in each case against the appellants therein, but not against the said McNeil and one Riddle, the latter of whom was a surety on each bond, and had been sued in each case. The judgment against F. A. McNeil and others, after a statement of the title of the cause, is in these words: "This day came the parties by their attorneys, and by consent of defendants, F. A. McNeil, S. G. Woolf, as administrator of the estate of H. A. Woolf, deceased, T. M. Witherspoon, T. H. Skinner and C. F. Compton, that judgment may be rendered against them in favor of the plaintiff for \$4,421.85: It is therefore considered and ordered by the court, that the plaintiff have and recover of said named defendants the said sum of four thousand four hundred and twenty-one 85-100 dollars, besides costs of suit in this case accrued, for which execution may issue. It is further ordered, that the defendants M. H. McNeil and A. A. J. Riddle have leave to file pleas within the next thirty days." The judgment rendered in the other case was similar, the parties defendant and amount only being different.

The errors here assigned in each case are, in substance, that the court erred (1) in the judgment rendered; (2) in rendering judgment on the consent of attorneys, who are not shown to have had any authority from the defendants to give such consent; (3) in rendering judgment without passing on the demurrer filed; and (4) in rendering judgment against a part of the defendants sued, without rendering judgment either in favor of, or against the other defendants.

JOHN W. PORTIS, and WATTS & SONS, for appellants.

H. C. TOMPKINS, Attorney-General, and SPROTT & ALTMAN, *contra*.

BRICKELL, C. J.—On error all reasonable presumptions are indulged to support the judgment of the primary court. The demurrers appearing of record do not seem to have been called to the attention of the Circuit Court, or any action upon them invoked. In this condition of the record it has been often held by this court, the presumption on error is, that the demurrer was waived.—1 Brick. Dig. 782, § 134. The presumption in this case is almost, if not quite indisputable, for on the day of filing the demurrers, the present appellants confessed the judgment from which the appeal is taken.

The statute is express, that a confession of judgment is a release of errors.—Code of 1876, § 3945. The words of the judg-

[Ex parte Dunlap.]

ment admit of no other construction than that the appellants consented to it—that they, not their attorneys, agreed, yielded assent to it. Consent removes or obviates mistakes or errors in the course of judicial proceedings. *Consensus tollit errorem*, is a conservative maxim of general application. If there be error in the judgment, the plaintiff and the Circuit Court were led into it by the consent of the appellants, a consent which involved an agreement on their part to waive, not to claim or take advantage of the error. The consent can not be withdrawn, and the judgments reversed at the instance of either party.

Let the judgment be affirmed.

Ex parte Dunlap.

Application for Mandamus.

1. *Construction of statutes.*—A statute ought to be so interpreted as to give to each clause, if possible, some meaning.

2. *Trial of right of property levied on under attachment ; place of trial.* When an attachment is levied in a county different from that in which it was issued, and a claim to the property is interposed, the statute (Code of 1876, § 3290) requires that the trial of the right of property must be had in the county in which the attachment was levied.

APPLICATION to this court for a writ of *mandamus* to compel the judge of the Circuit Court of Pickens county to strike cause from the docket.

David R. Dunlap, the petitioner, having, on 19 March, 1881, sued out of the Circuit Court of Mobile county an attachment against Bush, Yates & Co., a branch writ was issued to Pickens county, and there levied by the sheriff of that county on certain personal property, to which two claims were interposed, one by N. H. Harrison, claiming a portion of the property, and the other by Mrs. Dora E. Brown, who claimed the balance, the claimants executing the statutory affidavits and bonds, and receiving the property. The sheriff made a copy of the branch writ, and returned it, with the claim bonds and affidavits, to the Circuit Court of Pickens county, and returned the original branch writ to the Circuit Court of Mobile county. The clerk of the Circuit Court of Pickens county having placed these claim suit on the docket of that court as one cause, the petitioner moved to strike the cause from the docket. This motion having been overruled, he then moved to dismiss the cause out of that court, and this motion the court also over-

[Ex parte Dunlap.]

ruled. To these rulings he reserved exceptions, and applied to this court for a writ of *mandamus* to compel the Circuit Court to strike said cause from the docket, or to dismiss it out of said court.

M. L. STANSEL and TROY & TOMPKINS, for petitioner.

LEWIS M. STONE and D. C. HODO, *contra*.

STONE, J.—“When the levy [under execution] is made in a different county from that in which the judgment is rendered, if a claim is interposed to the property, it is the duty of the sheriff to return the original execution to the office of the clerk from which it issued, with his return thereon of the interposition of a claim; and make true copies of the bond and affidavit, which he must return with the execution. He must also make a true copy of the execution, and the returns thereon, which, with the affidavit and bond, he must return to the office of the clerk of his own county, where the trial of the right of property is to be had.”—Code of 1876, § 3345. Under this section it is too clear for argument that when the levy is made under execution, the trial of the right of property must be had in the county in which the levy is made.

“If property attached be claimed by a person not a party to the suit, and affidavit and bond be executed as required by law in cases of trial of right of property when levied on by a writ of *fiery facias*, the property must be delivered to the claimant, and the affidavit and bond be returned by the sheriff with the attachment, upon which the same proceedings must be had as in other trials of right of property, except that the sheriff must return the original attachment to the proper county.” Code, § 3290. The language of this section is not as clear as we could desire. Still we think enough appears to show that, except as expressed in the statute, the same rules must govern the claim-trial, when the levy is under attachment, as when it is under writ of *fiery facias*. The section last above copied does not in terms declare where such trial shall be had, and, to preserve analogy and harmony of procedure, we should, if possible, observe the same rule as to venue, which obtains when the levy is under execution. The phrase, “upon which the same proceedings must be had, as in other trials of right of property,” gives support to this construction. The clause, however, which makes it the duty of the sheriff to return “the original attachment to the proper county,” is most significant in its terms. That clause was evidently intended to qualify the preceding one, which required the sheriff to return the affidavit and bond with the attachment. If not so intended, we

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can imagine no purpose it was intended to subserve. Now, why make this exception as to the return of the original attachment, if the originals of both it and the affidavit and bond were to be returned to the court from which the attachment issued? We ought so to interpret the statute as to give some meaning to each clause, if we can. We are not able to give to this clause any operation, unless we hold that the originals of the affidavit and bond were required to be returned under different rules from those which govern in the return of the attachment. The sheriff must return the affidavit and bond, with the attachment, except that, no matter where the levy may be made, the original of the attachment must be returned to the proper county; that is, to the county from which the attachment issued. Reaching this conclusion, the only conceivable state of case in which the return of the affidavit and bond, and the original of the attachment could be rightfully made to different counties, would be where the attachment was levied in a county other than that in which it was issued. This construction preserves harmony, gives to each clause of the section some operation, and does not violate any statute we have found, or been referred to. We therefore adopt it.

Under the statute in force before the Code of 1852 was adopted, possibly the rule was different. See Clay's Dig. 211, § 52; *Id.* 57, § 11. The older statutes may have lent their aid, in raising doubts of the proper construction of our present system. The language of the present statute is essentially different from the old one, which provided that the said "bonds for the trial of the right of property shall be lodged with the clerk or justice where the attachment is returnable." When the levy was under execution, the old statute, like the Code, required the trial of the right of property to be had in the county in which the levy was made.

Mandamus refused.

Hooper, Adm'r, v. Strahan.

Bill in Equity to Enforce Vendor's Lien on Land.

1. *Decree in equity rendered in vacation; when valid.*—Under Rule 77 of Chancery Practice, as found in the Revised Code, and which is brought forward into the Code of 1876, as Rule 80, a decree of a court of equity, rendered in vacation, on 13th September, 1877, is valid.

2. *Section 3036 of the Code of 1876 applicable to suits in equity.*—Section 3036 of the Code of 1876, providing that all written instruments, the

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foundation of the suit, purporting to be signed by the defendant, etc., must be received in evidence, without proof of the execution, unless the execution thereof is denied by plea verified by affidavit, manifestly applies as well to courts of equity as to courts of law.

3. *Defense of bona fide purchase for value without notice, to bill to enforce vendor's lien; what answer must aver.*—A defendant to a bill in equity filed to enforce a vendor's lien, who is a sub-purchaser, and defends on the ground that he is a *bona fide* purchaser for value and without notice, must aver in his plea or answer clearly, distinctly and without equivocation, (1) that he is a purchaser from one in actual or constructive possession, who was seized or claimed to be seized of the legal title, at the same time setting out substantially the contents of the deed of purchase, with date, consideration and parties; (2) that he purchased in good faith; (3) that he parted with value by paying money or other valuable thing, assuming a liability, or incurring an injury, stating the nature of the consideration fully; and (4) that he had no notice of complainant's equity, and knew no fact calculated to put him on inquiry, either at the time of the purchase, or at or before the time he parted with the consideration.

4. *Same; when answer insufficient.*—Tested by the foregoing requirements, the answers of defendants in this case, who were sub-purchasers, and claimed that they were *bona fide* purchasers for value and without notice, are held to be insufficient.

5. *Allegations and proof must correspond.*—In such case, proof without allegations will not entitle the defendants to the benefit of their defense.

APPEAL from Lee Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed by Charles M. Hooper, as the administrator of the estate of Thomas D. Jones, deceased, against Thomas H. Strahan, Sarah Strahan, the widow and heirs of said decedent, and James M. Monk and J. T. McCoy, and its purpose was to enforce a vendor's lien on certain lands which said decedent sold to Thomas H. and Sarah Strahan, Monk and McCoy being made parties defendant as sub-purchasers of different portions of the land. The bill alleges that on 7th October, 1862, the decedent sold the lands on which the lien is claimed to Thomas H. and Sarah Strahan, and "executed his bond for title to them on the payment of the purchase-money, or made to them a deed or some other writing showing that such sale had been made, the precise nature of which your orator can not state, the same being in the possession of the defendants;" that for the purchase-money they jointly executed their two promissory notes, one for \$1,600, payable on 25th December, 1863, and the other for \$1,620, payable on 25th December, 1864; and that only \$700 had been paid thereon. These notes were made exhibits to the bill.

The defendants Monk and McCoy filed separate answers under oath, in which the execution of the notes was put in issue. The answer of Monk admits the purchase of the lands by Thomas H. and Sarah Strahan; denies, on information and belief, the making of a bond for title, and avers, also on infor-

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mation and belief, that said decedent, at the time of the purchase, executed to said Thomas H. and Sarah Strahan a deed to said lands, in which he acknowledged full payment of the purchase-money. The answer, as amended, further avers that in the year 187—, he purchased from Thomas H. and Sarah Strahan “four hundred and odd acres of land, being all the land described in the bill, except that claimed by said McCoy, at the price of \$1,100, \$100 of which he paid in cash, and for the balance he executed two notes of \$500 each, due at one and two years, which were thereafter sold and assigned” to one Tatum; that he settled both of the notes “by paying Tatum \$100 in money, and a mule valued at \$200, and by assuming a debt of \$200 due by said Strahan (?) to J. C. Meadows; and in consideration of said payment and of his assuming said indebtedness, Tatum delivered up to this defendant, as cancelled, said two notes;” that “in consideration of said payments said Thomas H. and Sarah Strahan executed on the ——— day of — 187—, a deed to defendant of said four hundred and odd acres, and this respondent has since claimed and held under said deed;” and that at the time of defendant’s purchase the said Thomas H. and Sarah Strahan were in possession, claiming title, as he is informed and believes, under an absolute deed from Thomas D. Jones, “and asserting that there was no outstanding lien on said lands;” that, as is stated on information and belief, “there was, at the time of his said purchase, no lien on said lands; and that when he purchased he believed he was getting a good title to said lands, free of all liens or incumbrances.”

McCoy, in his answer, claims sixty acres of the land sought to be subjected to sale, which he particularly describes; and, as to this part of the land, he admits the purchase by Thomas H. and Sarah Strahan from Jones, and avers, on information and belief, that Jones, at the time of the purchase, executed to them a deed in fee-simple, with full covenants of warranty, and acknowledging full payment of the purchase-money; that “on or about November 29th, 1869, J. R. Pinkard was in possession of said sixty acres of land, pretending to be seized in fee thereof, holding a deed with covenants of warranty from said J. H. and Sarah Strahan, of date September 30th, 1868; that believing from information which he had received, that Thomas H. and Sarah Strahan had obtained from Jones “a perfect legal and equitable title,” he, in the month of November, 1869, the exact date not remembered, purchased from J. R. Pinkard the said sixty acres for the sum of \$300, which he paid in cash, and received from him a deed, with covenants of warranty, duly executed and acknowledged by the said Pinkard and his wife, and conveying to him said sixty acres in fee simple; that at the time of his purchase he had “no notice whatever, nor

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any suspicion that said Jones held notes for the purchase-money, or any other claim or lien of any character on said land, or that any one else did; and that if said Jones did hold notes for the purchase-money, he is a *bona fide* purchaser for a valuable consideration, without any notice of complainant's equity, and without any notice that any purchase-money was due on said land to any one, and without any knowledge of any fact tending to show that any of the purchase-money was due."

As the decision of this court is based on the insufficiency of the said defendants' answers, the testimony need not be set out. The cause was submitted, on pleadings and proof, at the June term, 1877, and was held up by the chancellor for decree in vacation. On the submission, the complainant offered in evidence, *inter alia*, the two notes which were made exhibits to the bill, without proof of their execution. To the introduction of the notes the said defendants objected, on the ground that the execution thereof was not proved. On September 13th, 1877, in vacation, a decree was rendered, dismissing the bill, "without reference" to the objection made to the introduction in evidence of said notes; and that decree is here assigned as error.

G. D. & G. W. HOOPER, for appellant.—(1) The final decree in this case was rendered in vacation. This was irregular. *Rogers v. Torbut*, 58 Ala. 523. (2) No proof of the execution of the notes was necessary.—Code of 1876, §§ 3035–6. These sections apply to suits in equity as well as to suits at law. *Holman v. Bank*, 12 Ala. 369; *Bonner v. Young*, 68 Ala. 35. (3) The answers of the defendants Monk and McCoy are insufficient to set up the defense of *bona fide* purchases for value. *Ledbetter v. Walker*, 31 Ala. 175; *Johnson v. Toulmin*, 18 Ala. 50; 2 Brick. Dig. p. 518; *Shorter v. Sheppard*, 33 Ala. 648; *Boone v. Chiles*, 10 Peters, 177; *Jewett v. Palmer*, 7 Johns. Ch. 65. (4) Other questions not passed on by the court are also discussed.

J. M. CHILTON, *contra*, after discussing other questions which are not passed on by the court, contended, that there was no proof whatever that the notes were executed by Thomas H. and Sarah Strahan. Section 3035 of the Code of 1876 makes written contracts evidence, etc., only as against the party to the contracts and not as against parties between whom and the maker there is no privity.

SOMERVILLE, J.—It is insisted that the decree in this case is erroneous, because it was rendered in *vacation*, on September 13, 1877, without the agreement of the parties or their

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attorneys. In support of this view the case of *Rogers v. Torbut*, 58 Ala. 523, is cited and relied on by the appellant's counsel. It is there held, that there was no law in force authorizing such decree between December 8, 1873, when section 3470 of the Revised Code of 1867 was repealed, and December 9, 1877, when the Code of 1876 became operative, and the same section was again revived.—Code, 1876, § 3896. This case was in effect overruled in *Luddington v. Forrest*, 68 Ala. 1, which sustained a similar decree under the power conferred by Rule 77 of Chancery Practice, found in the Rev. Code of 1867, p. 834, and carried into the Code of 1876, as Rule 80, p. 172. It is provided expressly by this rule that “when a cause is submitted during term time for a decree or order, such decree shall be valid if rendered during any vacation.” There is no force, therefore, in the objection that the decree was rendered in vacation, as this was authorized by the above rule, which was in existence at the date of its rendition.

The notes given for the purchase-money, and purporting to be signed by the defendants, were *prima facie* evidence of the existence of the debt, and were properly admitted in evidence without proof of their execution. They were the foundation of the suit, and their execution was not denied by the defendants under oath. The sections of the Code (§§ 3035–6) bearing on this subject manifestly apply as well to courts of equity as to courts of law, the rules of evidence generally in each court being the same, except so far as modified by statute. *Holman v. Bank of Norfolk*, 12 Ala. 369, 413–4; *Bonner v. Young*, 68 Ala. 35.

It is urged in this case further, that there is a fatal variance between the allegations and the proof made by the defendants, and that although the evidence may have authorized the dismissal of the bill, the answers of the defendants Strahan and Monk were defective in failing to make the proper averments, showing that they were *bona fide* purchasers of the land in controversy for value and without notice.

The rule is settled in this State that, in such cases, it is required of a defendant, who is a sub-purchaser, to aver in his plea or answer clearly, distinctly and without equivocation, and with proper circumstantiality of detail, the following facts: 1st. That he is a purchaser from one in actual or constructive possession, who was seized or claimed to be seized of the legal title, at the same time briefly setting out substantially the contents of the deed of purchase, with date, consideration and parties; 2nd, that he purchased in good faith; 3rd, that he parted with value by paying money or other valuable thing, assuming a liability, or incurring an injury, stating the nature of the consideration fully; 4th, that he had no notice of com-

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plainant's equity, and knew no fact calculated to put him on inquiry, either at the time of the purchase, or at or before the time he parted with the consideration.—*Craft v. Russell*, 67 Ala. 9; 1 Brick. Dig. p. 718, § 1134; Story's Eq. Plead. § 805.

The answer of the defendant Monk fell very far short of these requirements, and that of McCoy was defective in failing to describe his deed with sufficient particularity, averring only the month and year of its execution without more.

The principle is settled that the *allegata* and *probata* in pleading must always correspond. Neither allegations without proof, nor proof without allegations will avail to entitle a complainant to relief, or a defendant to the benefit of his defense, unless the defect is remedied by amendment.—1 Dan. Ch. Pr. 361 (note 1); *Alexander v. Taylor*, 56 Ala. 60.

For the defects, as above pointed out, in the pleas or answers, as we may choose to consider them, of the appellees, Monk and McCoy, the decree of the chancellor must be reversed and the cause remanded for further proceedings. There are other questions argued in the briefs of the counsel not necessary to be considered, as they are not properly raised by the assignments of error.

Reversed and remanded.

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Bill in Equity to Enforce Vendor's Lien.

1. *Effect of findings of primary court on questions of fact when presented for revision on appeal.*—Where the primary court is charged with the duty of ascertaining and determining matters of fact dependent upon the *viva voce* examination of witnesses, without the aid of a jury, this court will, on appeal, attach to its findings the force and effect of the verdict of a jury, which can not be disturbed, unless it is plainly erroneous—opposed to all the evidence; but this rule is not applied to the decision of a chancellor, based upon evidence wholly in writing, which, in the same form, and under the same circumstances, is presented to this court.

2. *Presumption in favor of judgment or decree of primary court.* Whether a judgment or decree is assailed, on appeal, for error of law, or error of fact, a presumption of correctness prevails until it is removed by the party complaining of error; and to justify its reversal, this court must see, and see clearly, that it is wrong—that error of law or of fact infects it.

3. *Evidence; burden of proof.*—When the burden of proving a particular fact is cast upon a party, if he fails to give evidence of it, or if the evidence in reference thereto is equally balanced, or does not generate a

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rational belief of the existence of the fact, leaving the mind in a state of doubt and uncertainty, he must fail for want of proof.

4. *Payment; burden of proof.*—Where one claims that a debt, the prior existence of which is admitted or proved, has been paid by the substitution of another security, whether it be of higher or of the same dignity as the debt, he assumes the burden of proving that the substituted security was taken and accepted in extinguishment of the debt.

5. *What a conditional payment merely.*—Where a creditor received from his debtor an order on a third party for lumber, deliverable at the latter's convenience, which was accepted, the presumption of law is, that the order was received as a conditional, and not as an absolute payment; and the condition on which the order was to operate as a payment, the delivery of the lumber, not having occurred, in the absence of evidence tending to show that any loss or injury resulted from the creditor's failure to make a demand for the lumber, the debtor is not entitled to a credit on the debt.

APPEAL from Franklin Chancery Court.

Heard before Hon. THOMAS COBBS.

The case made by the record is sufficiently stated in the opinion.

GEORGE C. ALMON, W. J. BULLOCK and WATTS & SONS, for appellant.

WM. COOPER, *contra*.

BRICKELL, C. J.—The bill was filed to enforce a lien on lands for the payment of a promissory note executed to the appellant, the vendor, by the appellee, the vendee. The making of the note, and that it was given for part of the purchase-money of lands, is not controverted. The matter of dispute is, whether an order drawn by Phillips on one Duly (and by him accepted) for the delivery of lumber to the appellant, was taken in payment of the note; or if not taken as unconditional payment, whether it was not taken as conditional payment, and the appellant, not having used any diligence to obtain the lumber, or to make the order available, has not lost the right to demand of the appellee payment of the note. The chancellor, upon a hearing on pleadings and proof, rendered a decree dismissing the bill. The assignments of error raise no other inquiry than the correctness of the chancellor's conclusions upon the disputed matters of fact.

There is much reluctance in appellate courts to revise the findings of fact on conflicting evidence made by primary courts. The law, however, devolves the duty, and it must be performed. The rules and principles upon which the court will proceed are settled by a long line of precedents. If the primary court is charged with the duty of ascertaining and determining matters of fact dependent upon the *viva voce* examination of witnesses, without the aid of a jury, there are obvious reasons for attaching

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to its findings, as this court has declared should be attached, the force and effect of the verdict of a jury, which can not be disturbed unless it is plainly erroneous, opposed to all the evidence. The rule is not applied to the decision of a chancellor passing upon evidence wholly in writing, which, in the same form, and under the same circumstances, is presented to this court. Whether a judgment or a decree is assailed for error of fact, or error of law, a presumption of correctness prevails; a presumption which is indulged, and which will support it, until it is removed by the party complaining of error. It may not clearly appear that the judgment or decree is right; if it does not so appear, the presumption applies and preserves it. To justify its reversal, the appellate court must see, and see clearly, that it is wrong—that error of law, or of fact infects it.—*Lehman v. McQueen*, 65 Ala. 570.

In the consideration of all questions of fact, it is not only important, but it is indispensable to a fair, just determination, to bear in mind upon which party lies the burden of proving the disputed fact—which party affirms its existence and claims advantage or benefit from it. When upon a party the law casts the burden and duty of proving a particular fact, if he fails to give evidence of it, the non-existence of the fact is assumed. Or if the evidence in reference to the fact is equally balanced, or if it does not generate a rational belief of the existence of the fact, leaving the mind in a state of doubt and uncertainty, the party affirming its existence must fail for want of proof.—*Lehman v. McQueen*, *supra*.

It is unquestioned that bills or notes, or engagements of any kind, whether of the debtor himself, or of a third person, will not operate as payment or satisfaction of an antecedent debt, unless it is shown that they were given and received as absolute payment. Payment of a debt is an affirmative plea and an affirmative fact, which must always be proved by the party averring it, and whoever claims that a debt, the prior existence of which is admitted or proved, has been extinguished by the substitution of another security, whether it be of higher or of the same dignity as the debt, assumes the burden of proving that the substituted security was taken and accepted in extinguishment. The extinguishment arises from the agreement of the parties, not from the nature or character of the security, that may form the consideration of the agreement, but there is no implication of law that it shall operate as a payment—no implication that one cause of action is substituted for another. The presumption of law is, that all such securities are taken as conditional, not as absolute payment of a pre-existing debt. 2 Am. Lead. Cas. 264, *et seq.*; *Fickling v. Brewer*, 38 Ala. 685. There is a want of all legal evidence, or of circumstances, from

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which it may be justly inferred, that McWilliams accepted, or that Phillips offered the order on Duly as absolute, unconditional payment of his note for the purchase-money of the lands. The note was left in McWilliams' possession—there was no demand of it, or of its cancellation or destruction; and there is no reason assigned for the failure to demand it, or its cancellation, though Phillips, when the order was delivered, was on the eve of leaving the State, and on the day of its delivery he expressed his purpose to send money from Texas to his brother here, to pay the note. There is not only a want of all evidence showing that McWilliams agreed to take, and did take the order as payment of the note, but the evidence of such an agreement is inconsistent with all the established facts of the case.

The order expressed that the lumber was deliverable by *Duly* at his *convenience*. We do not understand that he could exercise his own choice and pleasure as to the time of its delivery—that he could prolong it indefinitely. He was not bound to an immediate delivery; but to a delivery within a reasonable time, determinable from the particular circumstances the parties had in view, when, with this stipulation, the order was given and accepted. If it appeared that on demand within such time, McWilliams could have obtained the lumber, and that loss or injury had resulted to Phillips from the failure to make the demand, it may be that McWilliams would be answerable for such loss or injury. But in the absence of all evidence tending to show that any loss or injury has resulted from the failure to demand the lumber, all that can be said is, that the order was a conditional payment, and that the condition on which it was to operate a payment has not occurred.—2 Am. Lead. Cases, 290.

The decree must be reversed and a decree here rendered, granting relief to the appellant.

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Bill in Equity for Dower.

1. *Dower; when not barred by divorce.*—Under the statutory provisions of this State, a divorce from the bonds of matrimony, obtained by the husband on the ground of voluntary abandonment, does not bar the surviving widow of her right of dower.

APPEAL from Jefferson Chancery Court.

Heard before Hon. THOMAS COBBS.

[Williams, Adm'rx, et al. v. Hale.]

The bill in this case was filed on 12th February, 1881. Its purpose and material allegations are sufficiently stated in the opinion. The defendant demurred to the bill on the following, among other, grounds: "Because the bill upon its face shows that a decree of divorce *a vinculo* was obtained by Gardner Hale, the husband of the complainant, before his death, in the Chancery Court of Jefferson county, Alabama, having jurisdiction of said cause, and that said decree was so granted to said Gardner Hale for and on account of the misconduct of the complainant, and against the complainant, and that said decree of divorce is still in force." The Chancery Court entered a decree overruling the demurrer, which is here assigned as error.

R. H. PEARSON, for appellant. (No brief came to the hands of the reporter.)

J. W. BUSH and J. T. TERRY, *contra*.—(1) It is conceded that a *statutory* divorce on the ground of adultery, *a vinculo matrimonii*, does bar the widow of her dower; for the statute expressly so provides.—Code of 1876, § 2698. A *common law* divorce for adultery is never *a vinculo matrimonii*, but always *a mensa et thora*.—*Wait v. Wait*, 4 N. Y. (Coms.), 100. Until our statute, Code, § 2696, there was no such thing as a divorce which recognized the validity of the marriage, and avoided it for causes happening afterwards.—*Wait v. Wait, supra*; and since our statute, but one cause, viz: *adultery*, committed after the marriage, has the effect to annul the marriage, so as to bar the right of dower; and this bar is alone in consequence of the statute. (2) In Lord Coke's time, there was no such thing as dissolving a *valid marriage*.—Bish. on Married Women, § 706. His maxim was, "*Ubi nullum matrimonium, ibi nulla dos*." A divorce *at common law* for a legal cause existing at the time of the marriage, such as bigamy or an incestuous marriage, annulled the marriage *ab initio*, and was styled a divorce *a vinculo matrimonii*, leaving not a vestige of the marriage contract.—*Ib.* (3) A *statutory* divorce has no retroactive effect on the validity of the marriage, or on the rights and capacity of the widow, or on the rights of the children of the marriage, other than the statute expressly provides. *Expressio unius exclusio alterius*.—Bish. on Mar. & Div. (6th Ed.), §§ 706-7; Code, §§ 2685-2703. (4) The policy of the law has always been to preserve with great care the right of dower, when it has once attached to the property of the husband.—Tyler on Inf. & Cov. p. 575; *Forrest v. Forrest*, 6 Duer (N. Y.), pp. 102-153; *Wait v. Wait, supra*. (5) If the legislature had intended to exclude the wife from dower when divorced from the husband on the ground of her abandonment of him, it

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would have so provided in express terms, as it did when she has been guilty of adultery; and failing to express her exclusion from dower in such case, it must be presumed that the legislature did not intend to exclude her. (6) But this is no longer an open question in this State. This court has decided that a divorce for abandonment does not bar the right of dower. 44 Ala. 450. See also on same point, 29 Ill. 442; 55 Penn. St. 375.

STONE, J.—The present is a bill filed by Mrs. N. L. Hale, the appellee, to recover dower in the lands of Gardner Hale, deceased. The bill sets forth that complainant, then Mrs. Thompson, intermarried with Gardner Hale in 1874, and that said Gardner Hale died in 1880. That during the coverture he, Hale, owned certain lands described in the bill, in which complainant claims dower, she never having relinquished her dower interest therein. Hale disposed of some of the lands after the marriage, by contract in which the complainant did not join. The heirs and personal representative of Hale, and also the purchasers of the portions of the lands sold, are made parties defendant. In 1875 the parties separated, Mrs Hale abandoning her husband and her home. They never afterwards lived together. Mr. Hale filed a bill, and obtained a divorce from the said N. L., his wife, on the sole ground of abandonment. The divorce, as our statute authorizes, was from the bonds of matrimony.—Code of 1876, § 2685. The bill, in its averments, sets forth all the foregoing facts, and in excuse for the separation says, that they lived together as husband and wife, “until their separation in 1875, without any fault on the part of oratrix, except her abandonment of him caused by his cruelty to her.” The bill is silent as to any defense interposed by Mrs. Hale to the divorce suit, and fails to show any of the rulings in said cause, other than the sentence of divorce. Hence we are not informed whether any and what allowance was made to the wife pending the divorce suit, under § 2694 of the Code, and what, if any, permanent allowance was made to the wife out of the estate of the husband, when the divorce was granted. There was a demurrer to the bill, which the chancellor overruled.

A majority of the adjudged cases, and the strength of the argument, lead to the conclusion that the result of a divorce from the bonds of matrimony is, to bar the wife of all claim of dower in the husband's estate. The maxim of Lord Coke is generally adopted, and held to govern in all cases of absolute divorce from matrimonial bonds. “It is necessary,” says that able jurist, “that the marriage do continue; for if that be dissolved, the dower ceaseth; *ubi nullum matrimonium, ibi*

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nulla dos." In England divorces *a vinculo* were decreed only for canonical causes—those which existed before the marriage. Those occurring after marriage—even adultery—only authorized divorces from bed and board. Hence, in England, divorces *a vinculo matrimonii* had the effect of declaring there never had been a legal marriage. It avoided them *ab initio*. On this account it has been often urged, and sometimes ruled, that absolute divorces, granted on our statutory grounds, do not fall within the reason of the rule, and do not bar her dower. The decided weight of American authorities, as we have said, holds that Lord Coke's maxim applies, and bars dower, in all cases of divorce from matrimonial bonds.—2 Scrib. on Dower, chap. 19, p. 507; 2 Bish. on Mar. & Div. § 706 *et seq.*; 2 Wait's Act. & Def. 606; *Clark v. Clark*, 6 W. & Sug. 85; *Colvin v. Reed*, 55 Penn. St. 375; *Cunningham v. Cunningham*, Cart. (Ind.) Rep. Vol. 11, 233; *McCafferty v. McCafferty*, 8 Blackf. 218; *Whitsell v. Mills*, 6 Port. (Ind.) 229; *Rice v. Lumley*, 10 Ohio Stat. 596; *Lamkin v. Knapp*, 20 Ohio Stat. 454; *Levins v. Sleator*, 2 G. Green's Iowa, 604; *Given v. Marr*, 27 Me. 212; *Wait v. Wait*, 4 Comst. 95; *Boykin v. Rain*, 28 Ala. 332. There is a *dictum* in *Turner v. Turner*, 44 Ala. 437, to the contrary.

By statute approved December 21, 1820—Clay's Dig. 170, § 8—it was provided that "the court pronouncing the decree of divorce shall also order and decree a division of the estate of the parties, in such way as to them shall seem just and right, having due regard to the rights of each party and their children, if any." But neither party could be divested of title to property. The use during life was the most that could be decreed under that statute. So the statute law of this State remained, until the Code of 1852 went into effect, January 17, 1853. Until that time our statutes were silent as to the effect of divorce on the wife's claim of dower. In cases of divorce *a vinculo* occurring before that time, the weight of authority would have led to the decision that the wife was barred of dower.

The Code of 1852 introduced some new regulations, which have undergone no change since that time. Among them are the following, copied from the Code of 1876:

"§ 2695. If the wife has no separate estate, or if it be insufficient for her maintenance, the chancellor, upon granting the divorce, must decree the wife an allowance out of the estate of the husband, taking into consideration the value thereof, and the condition of his family.

"§ 2696. If the divorce is in favor of the wife for the misconduct of the husband, the allowance must be as liberal as the estate of the husband will permit; regard being had to the con-

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dition of his family, and to all the circumstances of the case.

"§ 2697. If in favor of the husband for the misconduct of the wife, the allowance must be regulated by the ability of the husband and the nature of the misconduct of the wife.

"§ 2698. A divorce for the adultery of the wife, bars her of her dower, and of any distributive share in the personal estate of her husband."

Considering all these sections together, and bearing in mind that § 2694 is confined to the matter of provision for the wife pending the divorce suit, it would seem that §§ 2695-7 are intended to operate after the divorce is granted, and during the joint lives of husband and wife. This allowance is generally, and properly, made from year to year. The husband's financial condition may change, and a consequent change of the allowance may become necessary. When, however, the husband dies leaving the wife surviving, there is a necessity for the application of different principles. It can not be supposed that the estate of the husband will be kept together, and an annual allowance carved out of it for the support of the surviving wife. That would tend to delay distribution of the estate for we know not how long. Final, permanent provision must be made, or none can be made. The act of 1820 seems to have anticipated this, and rendered all inquiry as to dower unnecessary, by directing a division of the estate of the parties, when the decree of divorce is pronounced. That clause was dropped out of the statutes when the Code of 1852 was framed; and, at the same time, § 2698 was incorporated in the compilation, declaring what should cause a forfeiture of dower. Why insert this provision, if the divorce was *ipso facto* a bar of dower? And why declare that the adultery of the wife, if the ground of the divorce, should bar her of her dower, if any divorce *a vinculo*, granted to the husband for the misconduct of the wife, had the same effect? Why single out one statutory ground, which entitles the husband to a divorce from the bonds of matrimony, if any other statutory ground equally bars the offending wife? *Expressum facit cessare tacitum*. The rules of construction force us to hold that the divorce obtained by Mr. Hale, based, as the bill charges it was, on the ground of abandonment by her, does not bar the surviving widow of her right of dower. We reach this conclusion reluctantly, and think the discretion in the matter of division of the estates of the parties, allowed to the courts under the act of 1820, was much better adapted to meet the varying phases of such cases, than our present arbitrary rule is. The remedy is not with us.

Affirmed.

Agee v. Mayer Brothers.

Trover.

1. *Attachment by landlord against tenant; when may be levied on crop of under-tenant.*—An attachment sued out by a landlord for the recovery of rent, the mandate of which runs merely against the crops of the tenant in chief, authorizes a levy of the writ, not only on the crops of the tenant in chief, but also on the crops raised on the rented premises by an under-tenant.

2. *Same; competent evidence for sheriff, when sued in trover for conversion of crops levied on.*—The attachment in such case is competent evidence for the sheriff in an action of trover brought against him to recover damages for a conversion of cotton raised on the rented lands by the under-tenant, and seized by the sheriff under the attachment, by a purchaser, with notice of the landlord's lien, who was in possession of the cotton at the time of the levy.

APPEAL from Marengo Circuit Court.

Tried before LUTHER R. SMITH, Esquire, acting as Special Judge.

This was an action brought by the appellees against the appellant, to recover damages for the alleged conversion of three bales of cotton. In addition to the facts stated in the opinion, it may be added, that it was shown on the trial that Green, the sub-tenant, had fully paid his rent to Howze & Creagh, the tenants in chief; that the appellant offered to prove, in connection with the offer to introduce in evidence the attachment, that he levied the attachment on the crops of the sub-tenant, "because he had not been able to find sufficient property of the tenants in chief, Howze & Creagh, to satisfy the amount for which he was required by said writ to levy;" and that the mandate of the writ required the sheriff to attach so much of the crops of said Howze & Creagh grown on the rented premises, as would be of value to satisfy the debt claimed in the attachment proceedings, and costs.

E. P. MORRISSETTE, WATTS & SONS and JONES & JOHNSTON, for appellant.—(1) The plaintiffs in the attachment, as landlords, had a lien on the entire crop grown on the rented premises; and for the purposes of the attachment, all cotton grown thereon during the year, whether grown by the tenants in chief, or by their sub-tenants, was liable to the attachment.—*Givens v. Easley*, 17 Ala. 385. (2) Even if the writ had issued against the estate of Howze & Creagh, it would have only been irreg-

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ular, and might have been properly levied on the crop grown on the rented premises. Such a writ is not *void*, although it might have been abated on plea.—*Ellis v. Martin*, 60 Ala. 394; *De Bardeleben v. Crosby*, 53 Ala. 363. (3) The attachment, however, was not against the estate generally of Howze & Creagh, but was against their crops grown on the rented premises. All the crops grown on the rented premises are to be treated as the property of the tenant, so far as the rights of the landlord are concerned. The landlord's attachment could not be against the sub-tenant, for the relation of landlord and tenant does not exist between them. It could only be against his tenant, and then it can be levied on any crops on which the landlord has a lien for the payment of his rent.

MACARTNEY & CLARKE and W. H. TAYLOE, *contra*.—(1) It is not controverted that the landlord has a lien upon the crop of the under-tenant, nor that, to satisfy his demand for rent, he may levy on such crop to discharge the balance due, after exhausting the crop of the tenant in chief. But it is his duty to first exhaust such last mentioned crop.—Code of 1876, § 3476. Now, he may be satisfied that the crop of the tenant in chief will satisfy his demand, and may, in that case, sue out a writ only against such crop. That was done in this case. The mandate of the writ was directed against the *crop of Howze & Creagh alone*. If he chose to so limit his right, the sheriff had no right to go outside the mandate issued to him. (2) A writ to be levied on the crops of the sub-tenants, must run against the crops grown on the rented premises generally, and not be confined to the crops of the tenant in chief. The suit must, of course, be against the tenant in chief, but that need not narrow the language of the mandate of the writ. It is said by appellant's counsel, that all the crops are those of the tenant in chief. But section 3476 of the Code requires the landlord to take notice of the crops of the under-tenant, and makes a very considerable difference in the manner of the enforcement of the rent-lieu; and under it, the cases cited for appellant are not applicable. (3) The cases of writs running against the general estates of defendants are not in point. They were irregular because the mandate was too broad, but justified the officer in levying on any property within its expressed terms. In this case the mandate was limited, and the sheriff went outside of it. The writ was his commission, and to justify under it, he must not have exceeded its authority.

SOMERVILLE, J.—This is an action of trover brought against a sheriff for the alleged conversion of three bales of cotton. The defendant seeks to justify under a writ of attach-

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ment, issued at the instance of a landlord against the crops of his tenants in chief grown on the rented premises. The writ runs against the *crops of Howze & Creagh*, who were the *tenants in chief*, and the cotton in controversy was raised by one Green, an *under-tenant*, and by him sold to the appellees who purchased with notice of the landlord's lien.

It is insisted that the mandate of the writ only authorized a levy upon the particular crops raised by Howze & Creagh, and not on crops raised by under-tenants. This view was sustained by the court below, and the writ of attachment was excluded as evidence on objection of the plaintiffs.

We are of opinion that this was error. The lien, secured to landlords by statute for the payment of rent, is one *created by law* as an incident of the tenancy, and is not dependent on the issue and levy of the attachment.—Code, 1876, § 3467; *Ellis v. Martin*, 60 Ala. 394. "The whole purpose of the statute is to create a lien in favor of landlords on crops grown on rented lands, and to provide an efficient remedy for the enforcement." *De Bardeleben v. Crosby*, 53 Ala. 363. The ordinary phraseology of the writ has usually been in the form of a mandate to attach so much of the crops grown on the rented premises as may be sufficient to satisfy the debt and costs.—*Hawkins v. Gill*, 6 Ala. 620. In view of these principles, the construction insisted on by appellees' counsel seems to us too narrow and technical, especially in the light of the statutory provision which prohibits from prevailing any objection for want of form in the writ, "if the *essential matters* are set forth."—Code, § 3264. There is no privity of contract between the landlord and any of the occupants of his rented land except the tenant in chief, and in a certain sense, as to the landlord, all the crops, which are charged by law with the payment of rent, may be regarded as the crops of the tenant in chief, until this lien is discharged, waived or otherwise lost. "The attachment law must be liberally construed to advance the manifest intent of the law." Code, § 3315; *Ellis v. Martin*, 60 Ala. 394; *Blair v. Miller*, 42 Ala. 308; *Ware v. Todd*, 1 Ala. 199.

Sections 3476–7 of the Code are intended merely to require the crops of the tenant in chief to be exhausted before proceeding to go against the crops of the under-tenant. They can not be construed as intended to embarrass attachment proceedings, by encouraging objections for want of form in the writ, which are not of an essential nature.

The court erred in excluding the writ of attachment from evidence, and the judgment must be reversed and the cause remanded.

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Pique, Manier & Hall v. Arendale.

Statutory Real Action in the Nature of Ejectment.

1. *Consideration of deed in contest between grantee and creditors of grantor; rule as to admissibility of parol evidence.*—The rule that the consideration clause of a deed can not be varied by parol evidence in a contest between the grantee and the creditors of the grantor, merely prohibits parol proof of a consideration of a different kind from that expressed in the deed—as proof of a valuable consideration when a good consideration is expressed, or proof of a good consideration when a valuable consideration is expressed; it does not restrict the grantee to proof of the precise consideration recited in the deed, but he may show any consideration of the same kind.

2. *Same.*—It is competent for a grantee in a deed which recites a moneyed consideration, in a contest between him and a judgment creditor of the grantor, to show in support of the deed, that the true consideration was partly the payment of a debt or legal liability due from, or resting upon the grantor, and partly a promise on the part of the grantee to pay the grantor a specific sum of money.

3. *Same; when not regarded with suspicion.*—The fact that the true consideration of a deed was the payment of a debt or legal liability due from or resting upon the grantor, and the grantee's promise to pay the grantor a stated sum of money, while the recited consideration was money paid, does not of itself constitute a badge of fraud, or cause the transaction to be regarded with suspicion in a contest between the grantee and a judgment creditor of the grantor.

4. *When possession of real estate implied notice of vendor's title.*—The open possession of land by the tenant of a vendee who claims title under an unrecorded deed, operates as implied notice of the vendee's title to a creditor of the vendor, who, during the continuance of such possession, recovered judgment and purchased the land under an execution issued on the judgment; and such notice protects the vendee's title as effectually as the registry of his deed would have done.

5. *Payment of a debt as consideration of a deed; when sufficient.*—In a contest between a vendee and a judgment creditor of a vendor, it is immaterial whether a debt, the payment of which constituted the consideration of the deed, was contracted prior to, or contemporaneously with the execution of the deed, as, in either event, it is a valuable consideration, which, if adequate and free from fraud, will uphold the deed.

APPEAL from Jackson Circuit Court.

Tried before Hon. H. C. SPEAKE.

On 16th April, 1879, James A. Pique, James W. Manier and Lewis W. Hall commenced this action against William Allford, tenant of James Arendale, to recover certain land situate in Jackson county; and Arendale was, on his motion, made a party defendant under the statute. The plaintiffs and the defendant Arendale claimed title under one Lowrey Partin, the plaintiffs claiming under a sheriff's deed executed in July, 1878,

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and Arendale directly from Partin under a deed executed by him on 31st January, 1877.

On the trial the plaintiffs proved that on the 8th March, 1877, they recovered a judgment in said court against Partin for \$403.43 founded on a debt which was contracted 7th June, 1876, and that under an execution issued on the judgment the land sued for was sold by the sheriff on the first Monday in July, 1878, and was purchased by the plaintiffs for \$200, which was paid by crediting that sum, less costs of suit and expenses of sale, on the judgment; that thereupon the sheriff executed a deed conveying to them Partin's interest in said lands; that executions were duly kept up from the date of the rendition of the judgment to the date of sale; that the summons in said suit was served on Partin on 15th January, 1877; that another suit was commenced against Partin by other parties, and the summons therein was served on him on 27th January, 1877, and judgment rendered on 8th March, 1877, for \$355.22; and that Partin was insolvent on 31st January, 1877.

The defendant Arendale then proved and read in evidence a deed executed by Partin on 31st January, 1877, conveying to him the land sued for, the consideration recited in said deed being eight hundred dollars "to him in hand paid the receipt," etc. It was also shown that this deed was duly acknowledged and delivered on said day by Partin, but was not filed for record until 2d of October, 1877; and that said defendant, by his tenants, took possession of said land on 5th March, 1877, and afterwards continued in the possession thereof. The defendant Arendale was examined as a witness in his own behalf, whose testimony was, in substance, that in the spring of 1874, he sold Partin one hundred and sixty-three acres of land adjoining the land in controversy in this suit for \$2,000, payable in annual installments of \$500 each, and executed bond for title, taking Partin's notes for the purchase-money, and at the same time sold him some personal property; that these notes were not fully paid as they fell due, Partin having only paid about \$300 thereon; that in the fall of 1876, when the third note became due, defendant, being satisfied that Partin was unable to pay for the land, agreed with him to rescind the trade; but that, in the meantime, Partin had sold forty acres of the land which he had purchased from defendant; that thereupon the defendant purchased from Partin the land sued for in this action, and Partin executed to him the deed of 31st January, 1877, in consideration of said forty acres which Partin sold, and which defendant did not recover, estimated at \$400, and of the damages which defendant had sustained from Partin's failure to pay for said land sold to him by defendant, estimated at \$150 *per annum* for three years, amounting in the aggregate,

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to \$450, and in consideration of the further sum of \$100, for which defendant gave his note to Partin, payable the next fall, which was afterwards transferred by him to a third party, and paid by the defendant, thus making the consideration of said deed amount to the sum of \$950. To the testimony of Partin stated above the plaintiffs objected, on the ground that it tended to prove a consideration different from that expressed in the deed; but the court overruled their objection, and allowed the testimony to go to the jury, and they excepted. Said defendant further testified, that at the time Partin executed to him said deed, he did not know that Partin was insolvent; but he admitted on cross-examination facts tending to show, that he knew Partin was financially embarrassed. There was no evidence introduced on the trial tending to show that plaintiffs had any actual notice of the deed executed to defendant by Partin, until after it was recorded, in October, 1877.

The foregoing being substantially all the evidence bearing on the issues between the parties, the plaintiffs requested the court in writing to give to the jury the following charges: 1. "If Arendale omitted to record his deed from Partin for more than three months from its date, and the plaintiffs recovered their judgment against Partin without notice of said unrecorded deed, then the plaintiffs acquired a lien not limited or avoided by the deed to Arendale, and under which lien a perfect title was acquired by the plaintiffs, as purchasers at the sheriff's sale." 2. "It devolves upon the defendant to prove the consideration of his deed as it is expressed therein; and any evidence tending to show a different consideration than that expressed therein should be looked upon with suspicion." 3. "If the debt, which is claimed by the defendant to have been a part of the consideration of the deed to him from Partin, had no legal existence until after the rescission of the 163 acre land trade between them; and if the rescission of that contract was made at the same time the deed in evidence from Partin to Arendale was executed, then such consideration is not a pre-existing debt." These charges the court separately refused to give, and the plaintiffs duly excepted. The court then charged the jury, at the written request of the defendant, that "if the jury believe from the evidence, that the defendant, James Arendale, was in possession of the land in suit, or his tenants were in possession of said land, at the time plaintiffs recovered judgment, plaintiffs are not judgment creditors without notice, unless they find that the deed under which Arendale held was fraudulent, and that Arendale knew of, and participated in the fraud." To this charge the plaintiffs excepted.

The defendant obtained a judgment on verdict, from which

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the plaintiffs appealed; and they now assign as error the rulings above noted.

W. L. MARTIN, for appellants.—(1) A judgment creditor may, at law, proceed under execution to a sale of lands which his debtor has fraudulently aliened; and the purchaser may recover the land, in ejectment, from the fraudulent grantee.—*Carter v. Castleberry*, 5 Ala. 277; *Flewellen v. Crane*, 58 Ala. 627. (2) If the creditor's debt antedates the deed, the burden of proof is on the grantee to prove the payment of the purchase-money, or, if the deed was taken in payment of a pre-existing debt, to prove the existence and validity of such debt. *Hamilton v. Blackwell*, 60 Ala. 545. (3) A deed impeached by creditors for fraud, actual or constructive, can not be supported by evidence of a consideration different from that alleged in the deed.—*Murphy v. Branch Bank*, 16 Ala. 90. The writing is the sole expositor of the contract, and when assailed by creditors, it must be taken, as to the parties, as it is written.—*Potter v. Gracie*, 58 Ala. 303; Bump on Fraud. Con. 557. (4) Unrecorded conveyances are void as against judgment creditors without notice.—*Daniel v. Sorrells*, 9 Ala. 436; *Wallis v. Rhea & Ross*, 10 Ala. 451; S. C. 12 Ala. 646; *Jordan v. Mead*, 12 Ala. 247; *Pollard v. Cocke*, 19 Ala. 188; *Fash v. Ravieses*, 35 Ala. 451; *De Vendell v. Hamilton*, 27 Ala. 156; *Wood v. Lake*, 62 Ala. 489. See also *Betz v. Mullin*, 62 Ala. 365; Freeman on Ex. § 335. (5) A conveyance which misrepresents the transaction to which it relates, is at all times the object of doubt and suspicion.—*Pickett v. Pipkin*, 64 Ala. 520. (6) There is a well defined distinction between sales made in payment of an antecedent debt, and those made on a new consideration.—*Crawford v. Kirksey*, 55 Ala. 282. By the rescission of the land trade, Arendale's legal claims against Partin were satisfied. But not content with securing his own demand, he goes further and reaps a benefit voluntarily conferred by his debtor, stripping him of his land, with \$100 evidenced by note, and \$400 on the score of "damages." Under an executory contract of purchase, the vendee is free from liability to account for rents and profits, or damages for use and occupation. The unpaid purchase-money is the measure of liability. *Micou v. Ashurst*, 55 Ala. 607. The debt forming a consideration which will, as against creditors, support a transfer of property, must rest, not in moral; but in legal obligation, and the law must furnish a remedy for its enforcement.—*Hubbard v. Allen*, 59 Ala. 283. (7) The court erred in giving the charge asked by the defendant. It should have been left to the jury to determine, from the evidence, whether plaintiffs obtained their judgment against Partin without notice of the unrecorded

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deed to Arendale. Implied notice resulting from possession is subject to be rebutted or explained.—1 Story's Eq. 410 *a*. Possession suggests an inquiry into the claim of the possessor, and "such notice will be imputed to a purchaser only where it is a reasonable and just inference from the facts."—Herman on Ex. § 333. It has never been held in this State that the presumption of notice arising from possession is conclusive. See *Rogers v. Jones*, 8 N. H. 264; *Nutting v. Herbert*, 37 N. H. 346; *Harris v. Arnold*, 1 R. I. 125. In this case the possession was by tenants only three days before judgment. In every case heretofore decided by this court, in which possession is held sufficient notice of an unrecorded deed, the possession relied on was for a period of years, and was adverse and notorious. *Strickland v. Nance*, 19 Ala. 233; *Powell v. Allred*, 11 Ala. 318.

R. C. HUNT, *contra*.—(1) The evidence of the actual consideration of the deed from Partin to defendant did not tend to show a consideration different in kind from that expressed in the deed, and was therefore admissible.—*Hubbard v. Allen*, 59 Ala. 283. (2) The first charge requested by appellants was, no doubt, based on the case of *Wood v. Lake*, 62 Ala. 489; but that case is not in point. The deed executed to Arendale is not one of the instruments provided for in section 2166 of the Code. It was an absolute conveyance, founded on a valuable consideration. (3) Arendale was in possession at the time appellants' judgment was rendered. This constituted notice. The appellants were not, therefore, judgment creditors without notice. 9 Ala. 208; 12 Ala. 734; 12 Ala. 17; 64 Ala. 388; *Brunson v. Brooks*, 68 Ala. 248. (4) The deed from Partin was not only founded on a valuable consideration, but it must be presumed in this case that such consideration was adequate. There is no evidence tending to show that it was inadequate, or that there was any fraud in the transaction.

BRICKELL, C. J.—The general rule relied upon by the appellants, in support of the exception to the admission of evidence showing the precise consideration of the conveyance from Partin to Arendale, and of the exception to the refusal of the second instruction requested, is unquestioned. The consideration clause of a deed can not be varied by parol evidence in a contest between the grantee and the creditors of the grantor. If the deed recited only a *valuable* consideration, it can not be supported by evidence of a *good* consideration. Or, if it recited only a *good* consideration, it can not be supported by evidence of a *valuable* consideration. But the rule is not that the *precise consideration* must be proved, as it may be recited. Any

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consideration, greater or less, of the same kind, may be shown, and will support the conveyance, if otherwise fair. In this respect the matter of consideration is open to parol evidence in any direction. Thus, if the deed should recite as its consideration one dollar in hand paid, evidence that the real consideration was the present or precedent debt of the grantor of one thousand dollars would be admissible; or it would be admissible to show that the purchase-money was not paid, but secured by the promise of the grantor to pay it. The character of the consideration would not be varied; that recited and that proved would not vary in kind, but only in degree, and either would be sufficient for the common purpose of expressing the consideration, estopping the grantor from denying its existence, and rebutting the presumption of a resulting trust. It was entirely proper to permit Arendale to show that the real consideration of the conveyance under which he claimed title to the premises in controversy, was not money passing from him to the grantor, but payment of a debt or a legal liability, due from or resting upon the grantor, and the promise to pay the grantor a specific sum of money.—*Murphy v. Br. Bank Mobile*, 16 Ala. 90; *Potter v. Gracie*, 58 Ala. 303; *Hubbard v. Allen*, 59 Ala. 283.

If the evidence had shown or tended to show a different consideration from that expressed in the deed, it would not only have been regarded with suspicion, but would have been inadmissible. Or if there had been a gross exaggeration of the consideration, attended with other badges of fraud, the exaggeration would have been a suspicious circumstance. But it is not true, as the second instruction requested, when construed in connection with the evidence, must be regarded as asserting, that the expression of the consideration of money paid, and proof that the actual consideration was the payment of a debt, or the promise to pay money, is regarded with suspicion. It is too frequent to express money paid as the consideration, with much of indifference as to the sum, whenever a valuable consideration of any species is the actual consideration, for suspicions of unfairness or jealousy of the transaction to be indulged, in the absence of all badges of fraud.

The statute pronounces void, as to purchasers for a valuable consideration, mortgagees and judgment creditors, without notice, all conveyances of unconditional estates in lands, or mortgages or instruments in the nature of a mortgage, conveying real property to secure a debt created at the date thereof, unless recorded within three months from their date.—Code of 1876, § 2166. Notice of the conveyance, by the terms of the statute, equally with registration, preserves its validity. Before the appellants obtained judgment against Partin, before they were in relation to claim the protection of the statute as against the

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conveyance to Arendale, the actual possession of the premises had passed in accordance with the terms, legal effect and operation of the conveyance, from Partin to Troxwell, who entered and was holding visibly and notoriously as the tenant of Arendale. For a long period of time it has been the doctrine of this court, announced in numerous decisions, that as to judgment creditors, the open possession of lands accompanied with acts of ownership—to employ the words of ORMOND, J., in *Burt v. Cassity*, 12 Ala. 739—“is an implied notice, quite as effectual as the implied notice from the registry of the deed, and as potent in its effects as an actual notice of the existence of the deed before the judgment was obtained.” The visible possession of land, the exercise of dominion over it, the taking of its rents and profits, must be sufficient in itself and of itself to put any man of ordinary prudence, seeking to acquire an interest in the land, or to charge it, in hostility to the possessor, upon inquiry as to the right in which the possession is claimed. Putting him upon inquiry, it must operate to perfect and secure the title of the possessor as effectually as the registry of his title deeds.—*Ohio Life Ins. & Trust Co. v. Ledyard*, 8 Ala. 866; *Smith v. Zurcher*, 9 Ala. 208; *Daniel v. Sorrells*, *Ib.* 436. Of the conveyance from Partin to Arendale, the appellants are chargeable with notice at the time of the rendition of their judgment, and as the possession was continuous until the sale by the sheriff, having notice, the neglect of Arendale to register the conveyance is not material to them. There was no evidence tending to show that the rescission of the contract of sale, so far as it formed part of the consideration of the conveyance, was not an adequate consideration. It is not of importance whether that consideration is regarded as a debt pre-existing the conveyance, or as cotemporaneous with its execution. In either view, in the absence of all evidence of unfairness, or that from any improper motive it was imported into the consideration, it is not material whether it is regarded as a present or as an antecedent debt, satisfied or surrendered; either is a valuable consideration.

We find no error in the record, and the judgment must be affirmed.

Pike v. Pettus.*Bill in Equity to enjoin Action of Ejectment and to cancel Deed to Lands.*

1. *Parol contract for sale of lands; rule as to proof of part performance to take it out of the statute of frauds.*—To take a parol contract for the sale of lands out of the statute of frauds by part performance, and to obtain a specific performance thereof, the contract must be clearly proved, and the acts relied on as a part performance “should be so clear, certain and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part execution.”

2. *Same; when specific performance will not be decreed.*—When the testimony in reference to the contract is so conflicting that it can not be said to be “clearly proved;” or when the acts relied on as a part performance are of an equivocal nature, being such as might have been done with other views than in part execution of the agreement, a court of equity will not enforce a specific performance of the contract, or grant relief depending on the existence of the contract and its validity.

APPEAL from Madison Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed by William A. Pike against Samuel J. Pettus, on 18th October, 1879, to enjoin an action of ejectment which the defendant had commenced against the complainant in the Circuit Court of Madison county, and to have set aside and cancelled a deed executed by the sheriff of said county, under which the defendant claimed title. On 15th March, 1860, the complainant purchased the north-west quarter of section sixteen, township three, range two, west, and, with James Johnston and another as his sureties, executed four notes or bonds for the purchase-money. During the war Johnston paid two of these notes or bonds; and after the war suits were brought, and judgments obtained against Pike and Johnston on the other two notes or bonds. These judgments were paid by, and assigned to Johnston, who afterwards caused executions to be issued thereon, and placed in the hands of the sheriff of said county. The lands in controversy were sold by the sheriff under these executions, and were purchased by the defendant, to whom they were afterwards conveyed. The bill alleges that in 1861, the complainant bargained and sold the sixteenth section land, purchased by him, to Johnston, in consideration of his promise and agreement to pay off and discharge the notes or bonds which had been given for the purchase-money, and placed him in possession thereof, and that, in

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part performance of his contract of purchase, Johnston paid one of said notes or bonds in February, 1862, and another in March, 1862. The statement of the case made by the record in the opinion only renders it necessary to here set out the substance of the testimony of E. C. Betts, a witness examined on behalf of the complainant, to whose testimony reference is made in the opinion. He testified, in substance, that after the sale of the sixteenth section land to the complainant, the time not stated, at the request of a party who desired to purchase said land, and acting on information obtained from the complainant, the purport of which was that Johnston was then the owner thereof, he inquired of Johnston whether the land could be purchased, to which Johnston replied that "he had taken the land for his sister, Mrs. Bailey, and that it was not for sale." The witness further testified, in substance, that after the war he again inquired of Johnston whether the land could be purchased, and, if so, at what price; and that Johnston then stated that it could be purchased at what he had paid for it, the purchaser to pay him what he had paid thereon, principal and interest, and to assume the payment of the balance due on the purchase-money.

On final hearing, had upon pleadings and proof, the chancellor was of the opinion that the complainant was not entitled to relief, and caused a decree to be entered dismissing the bill. That decree is here assigned as error.

CABANISS & WARD and WALKER & SHELBY, for appellant.

BRANDON & COOPER, *contra*.

STONE, J.—The present case must be disposed of on the principles which obtain in suits for specific performance of a contract for the sale and purchase of land, of which there is no agreement, or note or memorandum thereof in writing, "subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing."—Code of 1876, § 2121. In *Waterman on Specific Performance*, § 265, it is said: "The parol agreement must be clearly proved, in order to take it out of the statute by part performance. . . Equity will not enforce specific performance of a parol agreement, if the evidence of such agreement is contradictory." And in 1 *Sto. Eq. Jur.*, § 762, it is said: "In order to make the acts such as a court of equity will deem part performance of an agreement within the statute, it is essential that they should clearly appear to be done solely with a view to the agreement being performed. For, if they are acts which might have been done with other views, they will not take the case out of the

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statute, since they can not properly be said to be done by way of part performance of the agreement." After mentioning certain acts which are insufficient, this author proceeds to say, that it is not enough, when the proof only shows acts of an equivocal nature; but that to be deemed a part performance, the acts "should be so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part execution."—See also, 1 Brick. Dig. 692, § 768.

The contestants in this case are agreed on the following facts: That the lands which gave rise to the present controversy were sold by commissioners, being part of a sixteenth section, and were purchased by Pike, the complainant in this suit; that Pike, the purchaser, gave his notes or bonds in four annual installments for the purchase-money, and James Johnston became one of his sureties on said notes or bonds; that the purchase was made in 1860; that Johnston paid the first two installments of the purchase-money in Confederate treasury notes, without suit; that after the war suit was brought on the remaining two installments, and judgments recovered against Pike and Johnston; that Johnston paid these judgments, and took an assignment of them to himself; that Mrs. Bailey, sister of Johnston, went into possession of said lands, part of said sixteenth section, in 1861, and remained in possession some four to six years; that Mrs. Bailey had children, all under age at the time she took possession, of whom Johnston, her brother, was guardian. There are other facts, about which there is no contest. Under executions issued on said judgments, which had been paid by, and transferred to Johnston, other lands of said Pike were levied on and sold by the sheriff, and bid off by Johnston for, and in the name of Pettus, the appellee. When these lands were offered, and before the sale was made, notice was proclaimed to the by-standers, at the instance of Pike, that Johnston, in paying the purchase-money of said sixteenth section land, was only paying a debt which he had made his own, and that therefore he had no rightful claim against Pike, in virtue of said judgments or their payment. We think Pettus must be charged with notice of this proclamation, either as having heard it made, or by admitted notice given to Johnston, his agent, who made the purchase. Johnston testified he heard the proclamation made, and Pettus is not examined as a witness. He was present at the sale. We are satisfied of another fact: That in 1861, Pike, by verbal agreement, sold the said sixteenth section purchase, and that under that verbal agreement to sell, Mrs. Bailey and her children took and retained possession of the lands. Pettus instituted an action of ejectment to recover the lands so purchased at sheriff's sale,

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and thereupon Pike filed the bill in this cause to enjoin the action of ejectment.

The bill avers that in 1861, by oral agreement between Pike and Johnston, the latter agreed to take the purchase off Pike's hands, and to become himself the principal in the purchase-money notes or bonds. That in pursuance of this agreement, Johnston took possession by placing his sister, Mrs. Bailey, and her family in possession; and that in like pursuance of the agreement, he, Johnston, paid the first and second of the purchase-money notes or bonds. These averred facts are relied on, as bringing the contract within the saving clause of the statute of frauds. The answer denies the agreement *in toto*, and sets up that Johnston paid the purchase-money notes because he, Johnston, was liable upon them, and further, that he paid them at the request, and for the accommodation of Pike. The testimony makes this case hinge on the following inquiries: Did Johnston purchase the lands from Pike as alleged—did Mrs. Bailey take possession under Johnston's purchase—and did Johnston pay the purchase-money notes in part performance of the purchase made by him; or, was the purchase made by Mrs. Bailey and her children, with the expectation on Pike's part, that the money would be paid to him by Johnston, out of the effects of the Bailey children, in his hands as their guardian. The chancellor ruled out a good deal of the testimony; but, for the purposes of this opinion, without passing on its legality, we will consider all the testimony which bears on the question of the alleged oral contract, as properly before us.

There is not a marked difference, either in the weight of the testimony, or in the number of witnesses on the opposing sides of the question, whether in fact such contract was made by Johnston. We can not affirm that the alleged oral agreement is "clearly proved." It is manifest the testimony is very contradictory. Neither are the acts relied on as part performance so clear, certain and definite in their object and design, nor do they refer exclusively to the alleged agreement, so as to come up to the rule. Johnston was bound, equally with Pike, for the payment of the purchase-money, and hence no sufficient inference can arise from the payment by him, nor does the taking of possession by Mrs. Bailey tend to show Johnston had purchased. Its natural tendency would rather be that Mrs. Bailey or her children were the purchasers. Nor can we regard the testimony of the witness Betts, after eliminating what Pike had said to him, as pointing necessarily to the fact that Johnston was the purchaser from Pike. Altogether, the testimony is in too much conflict to produce that clear conviction, which should never be dispensed with in suits for specific performance of oral contracts for the sale of land.

Affirmed.

[Dunlap, Adm'r, v. Mobley, Adm'r.]

Dunlap, Adm'r, v. Mobley, Adm'r.*Settlement of Insolvent Estate in Probate Court.*

1. *Construction of deed; what not a condition precedent.*—C., having executed a mortgage to S. on a tract of land owned by him, afterwards executed a deed conveying the lands to his children, reciting a valuable consideration, and containing covenants of warranty, in which was this clause: "Now, this conveyance is made to the parties of the second part, and to their heirs and assigns, absolute and in fee simple, with and on the following *conditions*, and with the knowledge and understanding of them as follows." Then, after a statement of the execution and existence of the mortgage to S. and of the note secured thereby, the deed proceeds: "Now, on payment of said note and full satisfaction of this indebtedness, made by either the party of the second part, then this conveyance shall be absolute in fee simple, and in full force and effect. Until said note is fully satisfied, the land conveyed to S. for the purpose of securing the payment of the same, is and shall remain subject to the conditions and purposes mentioned in the conveyance." The deed further provides that "upon the payment of said note by the party of the first part, or by the parties of the second part, all the right, title and interest in and to the above described land shall vest in the parties of the second part." *Held*,

(a) That the term *conditions*, as used in the deed, can not be construed in its technical, legal sense, but in its generic sense, to denote the predicament or *status* of the title.

(b) That the payment of the mortgage debt to S. was not made a condition precedent to the vesting of title in the grantees; but the effect of the deed was to convey the lands to the grantees, subject to the incumbrance created by the mortgage.

2. *When witness incompetent.*—On the settlement of the accounts of an administrator in chief, after a declaration of insolvency, with the administrator *de bonis non*, a creditor of the estate, being interested in the trust fund represented by the administrator *de bonis non*, though not a party to the record, is not a competent witness for the latter to prove a transaction with the deceased, which would tend to increase the liability of the administrator in chief.

3. *When administrator not entitled to credit for moneys expended.* Where the decedent conveyed lands to his children, subject to a mortgage which he had previously executed thereon, an administrator is not entitled to a credit on settlement of his accounts, after a declaration of insolvency, for moneys paid by him on the mortgage debt.

APPEAL from Greene Probate Court.

Tried before Hon. THOS. W. ROBERTS.

John R. Carpenter departed this life on or about 25th July, 1876, being at the time of his death a citizen of this State, residing in Greene county; and on 25th August, 1876, letters of administration upon his estate were granted by the Probate Court of said county to James P. Dunlap, the appellant. On

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3d February, 1879, on the report of the administrator, the estate was duly declared insolvent, and a day fixed for the administrator to make a settlement of his accounts. On 15th March, 1879, on the nomination of the creditors, made under the statute, Green B. Mobley, the appellee, was duly appointed administrator *de bonis non* of said estate; and on 19th August, 1879, a settlement of Dunlap's administration upon said estate was made. On the settlement the court, on the motion of the appellee, charged the appellant (1) with the proceeds of certain cotton which was raised on lands known as the "Rice place" during 1876, the year of the decedent's death, and (2) with the rent of the lands for the years 1877 and 1878. The evidence introduced on the settlement showed that the decedent became the owner of these lands in January, 1873; that on 19th December, 1874, he executed a mortgage thereon to Miss M. C. Strother, to secure a note for \$1,314, due on 1st January, 1876, and that on 28th December, 1875, he executed a deed conveying the lands to A. E. Dunlap, W. J. Carpenter and L. Carpenter, three of his children, for the consideration, as recited in the deed, of \$1,500, with covenants of warranty. The terms and provisions of this deed are sufficiently stated in the opinion. In the fall of 1876, as further shown by the evidence, the appellant, as administrator of the estate of said decedent, took possession of the cotton raised on the place that year, and shipped it to Dew & Kirksey, factors and commission merchants in the city of Mobile, by whom it was sold and the proceeds paid over to the appellant, who made return thereof in his inventory, as assets of the estate. Afterwards, in January, 1878, the proceeds of this cotton were claimed by the grantees under the deed of December 25th, 1875; and the question was whether the cotton belonged to the decedent's estate, or to said grantees, the solution of which depended mainly upon the construction of said deed. For the purpose of showing that the decedent cultivated said lands during the year 1876, the appellees examined, among other witnesses, J. M. Kirksey, a member of the firm of Dew & Kirksey, who were creditors of said insolvent estate, and offered to prove by him that in the spring and summer of 1876, the firm of Dew & Kirksey bought for, and shipped to the decedent, at his request, certain goods, provisions and supplies for said place. To this testimony the appellant objected, on the ground that Kirksey was an incompetent witness to prove any transaction with the decedent; but the court overruled the objection, allowed the offered proof to be made, and the appellant excepted. The appellant introduced evidence tending to show that, during the year 1876, said lands were cultivated by the grantees in said deed, and the crops grown thereon were raised by them. It was also shown that

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the appellant, as administrator, rented said lands for the years 1877 and 1878, taking notes for the rent; but that the rent for these years was claimed by, and paid to the grantees in said deed. In the settlement the appellant claimed credits for payments made by him to Miss Strother on the debt secured by the mortgage executed to her by the decedent; and the evidence tended to show that such payments were made with the proceeds of the sale of the cotton raised on said lands during the year 1876; but these credits the court refused to allow.

The rulings above noted, to which exceptions were duly reserved, are here assigned as error.

THOS. W. COLEMAN and SNEDECOR, COCKRELL & HEAD, for appellant.

WM. P. WEBB and CLARK & McQUEEN, *contra*.

STONE, J.—The deed of J. R. Carpenter to three of his children, bearing date December 28th, 1875, was evidently drawn by one unskilled in the law. Its provisions are, in some respects, so inaptly expressed, that we find it difficult to arrive at the grantor's intention with satisfactory conviction. One clause of the deed, considered by itself, indicates that the title was not to pass to the grantees, until they paid to Miss Strother the debt secured to her by mortgage on the lands. That clause is as follows: "Now, this conveyance is made to the parties of the second part, and to their heirs and assigns, absolute and in fee simple, with and on the following conditions, and with the knowledge and understanding of them as follows." Then comes a statement that the lands conveyed were under a mortgage previously executed to a Miss Strother, to secure a debt to her of thirteen hundred and fourteen dollars, and the deed proceeds: "Now, on payment of said note and full satisfaction of this indebtedness made by either the party of the second part, then this conveyance shall be absolute in fee simple, and in full force and effect." Giving to the words "conditions," and "fee simple" their strict legal signification, they tend to show that title was to remain in the grantor, until the debt to Miss Strother was paid. The next clause, however, tends to show that was not the idea the draughtsman had in his mind. Its language is, that "until said note is fully satisfied, the land conveyed to Miss Cora Strother for the purpose of securing the payment of the same, is and shall remain subject to the conditions and purposes mentioned in the conveyance." The clause last copied is stated antithetically to that first copied. The relation of the clauses is well maintained, if we construe their meaning to be, that if the grantees paid the debt to Miss

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Strother, then the condition—state—of the title would, and was intended to be, a fee simple in them. But until the debt was paid, the lands remained subject to her mortgage claim. The relation is not maintained, if we give to the word “condition” its technical, legal sense. We think the draughtsman of the deed employed the word “conditions” in its generic sense, to denote the predicament, or *status* of the title; its then condition. He did not convey an absolute fee simple; he had none to convey. He owned but an equity of redemption, and he could convey only such title as he owned. The deed, however, containing covenants of warranty, would vest in the grantees a title in fee simple, whenever the incumbrance should be removed by a payment of the mortgage debt.—*Chapman v. Abrahams*, 61 Ala. 108. A later clause in the deed renders this construction satisfactory. It provides that “upon the payment of said note [to Miss Strother] by the party of the *first part*, or by the parties of the second part, all the right, title and interest in and to the above described land shall vest in the parties of the second part,” etc. This demonstrates that payment to Miss Strother of her demand *by the grantees* was not made a condition precedent to the vesting of title in them. The deed only mentioned the mortgage, because it was an incumbrance, which prevented the grantor's deed from conveying a fee simple title. This construction harmonizes the entire deed with the granting clause, which is general in its expressions of present bargain and sale.

Kirksey was not a competent witness for the administrator *de bonis non*, to prove a transaction with Carpenter, the decedent. The purpose and effect of his testimony were to increase the sum of the assets, in which he, as a creditor of the insolvent estate, would be entitled to a dividend. True, he was not known as a party on the record. Mobley, however, was only a trustee of a trust fund, of which Kirksey was one of the beneficiaries.—Code of 1876, § 3058; *Tisdale v. Maxwell*, 58 Ala. 40; *McCrary v. Rash*, 60 Ala. 374.

The product of the property conveyed by the deed should not have been charged against the administrator in chief. If he paid part of the mortgage debt to Miss Strother, he did it in his own wrong, and is not entitled to a credit therefor in his settlement. The most he can claim will be to come in as a creditor against the insolvency, if he has put himself in condition to do so.

Reversed and remanded.

Smith v. Whitfield.*Trover.*

1. *Choses in action belonging to wife's statutory separate estate; power of husband to collect.*—The husband has the power to reduce to possession choses in action belonging to the wife as her statutory separate estate.

2. *Same; power of husband to reinvest.*—When such choses in action have been reduced to possession by the husband, he, as trustee of the wife, has the power, and it is his duty to invest the proceeds in other property; and when invested in other property, such property becomes the statutory separate estate of the wife.

3. *Wife's statutory separate estate; what a part of.*—Where the wife, as legatee, was entitled to a distributive share in certain assets in the hands of the personal representative of her testator, consisting in part of a note made by a debtor to the estate, such distributive share being her statutory separate estate, and the husband purchased for her from such debtor a horse and paid for it by getting the personal representative to credit the amount of the price of the horse on the note, and charge it to the wife on account of her distributive share in said assets,—*held*, that this was not an assignment or transfer by the husband of a part of the distributive share of the wife in payment for the horse, but was a payment of the price of the horse by a payment *pro tanto* of the wife's distributive share; and that by operation of law, the legal title to the horse vested in the wife, as her statutory separate estate.

APPEAL from Marengo Circuit Court.

Tried before Hon. HARRY T. TOULMIN.

This was an action of trover, brought by Mary M. Whitfield, a married woman, against S. D. Smith, to recover damages for the alleged conversion by the defendant of a horse, averred to have belonged to the plaintiff as a part of her statutory separate estate. The cause was tried on issue joined on the plea of not guilty. There was no conflict in the evidence introduced on the trial in the court below, and the facts disclosed thereby are, in substance, as follows: The plaintiff, the wife of Clinton Whitfield, as legatee under the will of Mary Bryan, deceased, was, in January, 1876, entitled to a portion of the assets belonging to her testatrix' estate, then in the hands of the administrator *de bonis non*, with the will annexed, a part of which assets consisted of a note made by one M. W. Davis, for \$2,000, past due; and her interest in said personal assets under said will was a part of her statutory separate estate. During the year 1876, plaintiff's husband offered to buy from Davis the horse in controversy for plaintiff, and to pay for it by giving him credit on the note which Davis owed

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to the administrator of plaintiff's testatrix for the agreed price of the horse, and have the same charged to his wife on account of her distributive share in said note, if the administrator would agree to such an arrangement; and he further agreed to give Smith an order on the administrator for the price of the horse, to be credited on said note. Davis accepted the offer, and in consideration thereof, and of the agreement on the part of plaintiff's husband to give said order, delivered the horse to him, who took and held possession of it for plaintiff until some time thereafter, when the horse was put in the possession of one Cheney as plaintiff's agent. No part of the transaction between the plaintiff's husband and Davis was in writing. The administrator of the estate of plaintiff's testatrix, agreed to the arrangement made by plaintiff's husband with Davis, and afterwards, on a settlement of the note, Davis was allowed a credit thereon for the price of the horse, and the amount thereof was charged against the plaintiff on her distributive share in said estate; but the plaintiff's husband never gave Davis the order on the administrator as he had agreed to do. In April, 1877, the defendant sued out an attachment against the plaintiff's husband to recover a debt which he owed the defendant, and which was contracted prior to the purchase of the horse; the attachment was levied on the horse as the property of plaintiff's husband; and afterwards the horse was sold under proceedings duly had in the attachment suit, and at the sale the defendant became the purchaser, took possession under his purchase, and afterwards, and before the commencement of this suit, sold it. The value of the horse was also proved.

The court, *ex mero motu*, charged the jury, among other things, as follows: 1. "If the jury believe from the evidence, that the plaintiff's husband bought the horse from Davis for his wife and in her name, and they agreed that Davis was to be paid for it by getting credit on his note due Bryan's estate, of which estate the plaintiff was a distributee; and they find that the administrator of said estate consented to said arrangement, and subsequently credited said Davis on the settlement of his said note with the purchase-price of the horse, and charged the same to plaintiff on her distributive share in said note, then the horse was the statutory separate estate of plaintiff, and could not be taken for her husband's debt." 2. "That the possession of the horse by Cheney as agent of plaintiff, or of her husband, was her possession." To each of these charges the defendant separately excepted. The defendant asked the court in writing to give the following charges: 1. "If the jury believe the evidence in this cause, they must find for the defendant." 2. "If the jury believe from the evidence, that Whitfield, the husband of the plaintiff, obtained the horse

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sued for from Davis by agreeing to give him an order for the amount of the price thereof on the administrator of the estate of Mary Bryan, deceased, of whom plaintiff was a legatee, and of which estate she was entitled to a distributive share, and she did not join in any order with her said husband, the plaintiff can not recover in this action, and they must find for the defendant." The court refused to give each of these charges, and the defendant separately excepted.

The plaintiff recovered a judgment on verdict, from which this appeal was taken. The rulings above noted are here assigned as error.

W. H. TAYLOE, for appellant.—(1) That appellee's interest in the estate of Mary Bryan was property, is beyond dispute. *Sharpe v. Burns*, 35 Ala. 662; *Hardy v. Boaz*, 29 Ala. 168. And it was her statutory separate estate.—*Smilie v. Siler's Adm'r*, 35 Ala. 88. It could, therefore, only be conveyed as provided by statute.—Code of 1876, § 2707. (2) No conveyance was made of any portion of the appellee's said estate, and the entire agreement between her husband and Davis was verbal. The title to no part of her separate estate, therefore, passed to Davis. The transaction merely gave her the right to elect whether she would take the horse or her full share in said estate.—*Bolling v. Mock*, 35 Ala. 727; *Evans v. English*, 61 Ala. 424. Her remedy, therefore, was not at law, and she can not recover in this action.—11 Ala. 859; 35 Ala. 102. (3) Under the decision in *Wilder & Co. v. Abernethy*, 54 Ala. 644, the horse was subject to the payment of the husband's debt.

GEO. G. LYON, *contra*.—The evidence shows a statement of facts that can be construed to be nothing more or less than that the appellee's husband received a part of the portion of the proceeds of Davis' note to the administrator of the estate of Mary Bryan, deceased, that was coming to his wife, as her statutory separate estate, from said estate, of which she was a distributee, and that he invested it in the purchase of the horse for his wife. As her husband and trustee he had the right and power to do both.—Code of 1876, §§ 2709, 2710; *Evans v. English*, 61 Ala. p. 425. There was no sale or alienation of the wife's statutory separate estate.

BRICKELL, C. J.—The share of the wife, as a distributee of the unsettled estate of Mary Bryan, in the hands of the administrator, Evans, was a part of the *corpus* of the statutory separate estate of the wife.—*Smilie v. Siler*, 35 Ala. 88; *Sharpe v. Burns*, *Ib.*, 653. The husband has not power to assign or transfer it, and it was incapable of transfer or assign-

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ment in any other mode than by instrument in writing signed by husband and wife, and attested by two witnesses, or acknowledged as the statute directs.—*Smith v. Oliver*, 31 Ala. 39; *Whitman v. Abernathy*, 33 Ala. 154. If the husband, by assignment or transfer, had alienated the distributive share, converting it into property of any other kind, the wife could have elected to take and hold such property. The election could not be asserted in a court of law, thereby drawing to the wife the legal title to such property. In a court of equity only could the election be manifested, the husband converted into a trustee, and divested of the legal title. Until the election was manifested, and the equity of the wife declared and enforced by a decree, the legal title would reside in the husband.—*Bolling v. Mock*, 35 Ala. 727; *Evans v. English*, 61 Ala. 416.

The statutory separate estate of the wife vests in the husband as her trustee, and it is declared: "The husband has power to receive property enuring to his wife, or to which she is entitled; and his receipt therefor is a full discharge in law and equity."—Code of 1876, § 2710. This power is most frequently exercised by the husband in reducing to possession the choses in action of the wife. When reduced to possession, as trustee, the husband has power, and it is a duty to invest the proceeds in other property, or to use them as may be most beneficial for the wife. If invested in other property, such property becomes the statutory separate estate of the wife. *Marks v. Cowles*, 53 Ala. 499.

The point of controversy in this case is, whether there was an assignment or transfer by the husband of a part of the distributive share of the wife in payment for the horse; or, whether there was payment of the price by a payment *pro tanto* of the distributive share. The latter is the true character of the transaction. It was not intended that any part of the distributive share should be transferred to Davis, the vendor. It was intended only that a credit to him upon his note, payable to the administrator, should operate a payment of the price of the horse, and a payment to the husband to that extent of the distributive share of the wife. This was the transaction in fact and in legal effect. The price of the horse was paid—there was an exemption to the husband of all liability for it, and a corresponding exemption to the administrator to its amount from all liability for the distributive share. By operation of law, the legal title to the horse was invested in the wife—it was her statutory separate estate.—*English v. Evans*, *supra*. The case bears no analogy to that of *Wilder v. Abernethy*, 54 Ala. 644, in which the husband, carrying on business in the name of the wife, purchased goods on the credit of the wife, not using

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the moneys or effects of the wife, and it was held, the goods were not the property of the wife.

There is no error in the rulings of the Circuit Court, and its judgment is affirmed.

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Trespass de bonis asportatis by Mortgagor against Mortgagee.

1. *When mortgagee of personal chattels not a trespasser.*—Under a power contained in a chattel mortgage authorizing the mortgagee, on default, to take possession of the mortgaged property without process of law, and to sell the same, the mortgagee has the right, after default, to enter upon the premises of the mortgagor, and, without his consent and against his will, to take possession of the property, provided he does so peaceably and without violence or other breach of the public peace; and such taking, being the exercise of a right, will not constitute him a trespasser. (STONE, J., *dissenting*.)

2. *Trespass de bonis asportatis; measure of damages.*—In trespass *de bonis asportatis*, founded on a mere wrongful taking, unaccompanied by any act of wantonness, malice or gross negligence, the measure of damages is the value of the plaintiff's interest in the property at the time of the trespass, and not the value of the property itself.

3. *Same.*—Hence, in such action brought by a mortgagor against a mortgagee for the wrongful taking of the property conveyed by the mortgage, the defendant is entitled to prove, in mitigation of damages, the amount due on the mortgage debt.

4. *Ratification by principal of agent's trespass; admissibility of evidence.*—In an action of trespass by a mortgagor against a mortgagee, founded on the unauthorized wrongful seizure and asportation of the mortgaged property by the defendant's agent, a letter written by the plaintiff to the defendant, and delivered to him, giving an account of the manner in which the property was seized and carried away, and demanding its return, is competent evidence for the plaintiff for the purpose of proving a ratification by the defendant of his agent's act, when it is shown that the letter contained a correct version of the alleged trespass, and its contents are presumptively shown to have been known to the defendant. But the letter itself should be produced, or a proper predicate laid for secondary evidence of its contents.

5. *When damages are too remote.*—In trespass for wrongfully seizing and carrying away plaintiff's live stock while he was engaged in farming, damages resulting therefrom to his farming operations are too remote, speculative and contingent to be recovered.

6. *Admissibility of evidence.*—A statement by a witness on the trial of an action of trespass *de bonis asportatis*, that the plaintiff *consented* to the taking of the property by the defendant, is the assertion of a fact, and not of a mere opinion, and is, therefore, admissible evidence. The nature of such consent may be shown on cross-examination.

7. *Same.*—It is always competent for a witness to give any pertinent reason for the accuracy of his recollection of a fact to which he has testified; and hence he may state that he had consulted counsel in reference

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to the matter of dispute; but it is not permissible in such case for him to state what advice his counsel gave him.

8. *When charge invasive of province of the jury.*—The jury are not compelled to find according to the mere preponderance of the evidence, unless it produces a reasonable conviction, or satisfaction of the mind; and hence, a charge instructing the jury that “if the weight of evidence is in favor of the plaintiff, he should recover,” is an invasion of the province of the jury, and erroneous.

APPEAL from Clay Circuit Court.

Tried before Hon. LEROY F. BOX.

Alex. C. Sinclair, the appellee, commenced this action on the 5th of January, 1878, against Merit Street, George W. Dillard, the appellees, and one W. A. Davenport, to recover “one thousand dollars damages for wrongfully taking the following goods and chattels, the property of plaintiff, viz: One mule and one mare, of the value of three hundred dollars.” W. A. Davenport was not found, and service was only had on the other two defendants, who pleaded separately “not guilty, with leave to give in evidence any thing that might be specially pleaded;” and on the issue thus made the cause was tried.

It appears from the bill of exceptions that on the 24th of March, 1874, the plaintiff and his brother, John C. Sinclair, being indebted to the defendant Street in the sum of \$60.00, and also in the sum of \$55.52, as evidenced by their two joint promissory notes payable on 1st November, 1874, executed to him a mortgage covering the property mentioned in the complaint, together with other property, real and personal, to secure said indebtedness. This mortgage provides that, if any part of said indebtedness should remain unpaid after the 1st of November, 1874, “then the party of the second part [Street], his agent, heirs or assigns are hereby authorized to take absolute possession of any or all of said property without any process of law, and sell the same at such time and place as he, his agent, heirs or assigns may elect, to the highest bidder at public outcry,” etc. On the 7th of March, 1877, Dillard and Davenport, as the agents of the defendant Street, came to the plaintiff’s house, bringing with them said notes and mortgage, which they read to plaintiff and requested payment in the name of Street. Not receiving payment, they took the mare and mule mentioned in the complaint out of the plaintiff’s horse lot, and carried them off and delivered them to Street. The evidence is conflicting in reference to the circumstances under which they obtained possession of the mare and mule. The testimony of the plaintiff and his witnesses tended to show, that after the notes and mortgage were read to plaintiff, and payment requested of him, he stated to Dillard and Davenport that he did not have the money, but that if they would wait he would see Street and fix it up with him; to which one of

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them replied that they would have the stock any way; that the plaintiff objected to their taking the stock, and forbade them taking it; but that they disregarded his objections, and went into the horse-lot of plaintiff and took the mare and mule and carried them off with them. The testimony of Dillard and Davenport, witnesses examined on behalf of the defendants, however, tended to show, that after they had read the notes and mortgage to the plaintiff, they told him that they had been instructed to collect the money, if he would pay, and if he would not, to get the papers renewed; that the plaintiff refused to renew the papers, and told them that they could get the mare and mule, and that said animals were in his lot; and he then walked to the lot with them, pointed out the mare and mule to them, and they thereupon took them and delivered them to Street, telling him how they had obtained possession. The foregoing is the substance of the versions of the two sides as to the circumstances attending the taking of the mare and mule from the plaintiff's possession. There was no evidence of any violence on the part of Dillard and Davenport, nor was there any evidence of any resistance on the part of the plaintiff, other than as above stated.

On the cross-examination of the plaintiff, who was examined as a witness on his own behalf, the defendants asked him how much he owed the defendant Street on the mortgage debt at the time his mare and mule were taken. To this question the plaintiff objected, and his objection was sustained by the court, and the defendants excepted. The defendants then offered to read the notes and mortgage in evidence, but the plaintiff objected, and the court having sustained the objection, the defendants excepted. The witness was then allowed by the court, in answer to a question put to him by the defendants, to state that he was in debt to the plaintiff at the time of the alleged trespass, but, on his objection, the court refused to allow him to state the amount of such indebtedness, and the defendants excepted. The notes and mortgage were then read to the jury "as a part of the evidence of what was said and done at the time the witness was speaking of." In rebuttal, the plaintiff was asked by his counsel how he remembered so distinctly that he refused to give up the mule and mare, and to state whether or not he had been advised by counsel to refuse to give them up. The defendants objected to this question, but their objection was overruled, and they excepted. He replied that he had been advised by his counsel to object to the taking of the property before it was taken. The defendants objected to this answer, but their objection was overruled, and they excepted. The plaintiff was also asked by his counsel what plowstock he had the year when his mare and mule were taken, and

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he replied that he had no other stock than said mare and mule. To both the question and answer the defendants separately objected, but their objections were overruled, and they excepted. He further testified that he was engaged in farming and had begun to pitch his crop, or had made arrangements to do so, when his said stock was taken from him. To this testimony the defendants also objected, but the court overruled their objection, and they excepted.

The said Davenport was not present at the trial, but a showing was made as to what he would prove, which was offered in evidence by the defendants. In this showing it was stated that the plaintiff "first objected to delivering the property to Dillard for Street, but then consented." To this part of the showing the plaintiff objected, and he also objected separately to the word "consented." The court sustained the objection, and refused to allow that part of the showing to be introduced in evidence, and the defendants excepted. The defendant Street was also examined as a witness for the defendants, and testified that he sent Dillard to collect the debt or get it renewed, but that he gave him positive instructions not to take the property by force, and to let it remain unless the plaintiff consented to deliver it. He also testified that the notes secured by the mortgage were not fully paid. On cross-examination, the plaintiff asked, this witness whether one John Machen came to him with a letter from plaintiff written by counsel, informing him of the manner in which the property had been taken, and demanding its return, in a few days after the mare and mule were taken. To this question the defendants objected, but their objection was overruled, and they excepted. The witness replied, that "he thought they claimed the property taken;" and to this answer the defendants objected, and the court having overruled their objection, they excepted.

The court, in its general charge, instructed the jury, among other things, as follows: (1) "If you should find from the evidence that Street had a mortgage on the mare and mule, which was past due at the time of the taking, that alone would confer no right upon the defendants to take possession of the mortgaged property, against the will and without the consent of the plaintiff." (2) "If you find from the evidence that the property was taken by the defendants from the possession of the plaintiff against his will and without his consent, and notwithstanding the plaintiff at the time forbid the taking, then the mere fact that the plaintiff owed Street a debt at the time, which was secured by a mortgage on the property, would not justify the taking." (3) "Threats or actual physical force are not required to constitute a wrongful taking." (4) "If you believe from the evidence that the plaintiff forbid the taking, and

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that the defendants took the property notwithstanding they were so forbidden, the taking would be wrongful." To each of the above portions of the general charge the defendants excepted. The court, in its general charge, also instructed the jury as to the rules relating to vindictive or exemplary damages, to which exceptions were reserved by the defendants. But the instructions on this point are not necessary to a correct understanding of the opinion. The court also instructed the jury, at the request in writing of the plaintiff, that "if the weight of evidence is in favor of the plaintiff, he should recover damages." To this charge the defendants excepted.

Judgment was rendered in favor of the plaintiff on verdict, from which the defendants appealed, and now assign as error the rulings of the Circuit Court above noted.

PARSONS & PEARCE, for appellants.

A. S. STOCKDALE, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—This is an action of trespass by a mortgagor against a mortgagee, for entering the premises of the plaintiff and carrying away certain personal property, a horse and a mule, conveyed by the mortgage. The taking was done by the mortgagee's agents, who are jointly sued with him in this case, and, in point of time, the asportation occurred after the law-day of the mortgage.

It is true that a mortgagee may be liable in trespass or trover to a mortgagor for wrongfully disturbing the latter's possession. The question is, under what circumstances will such disturbance be considered wrongful, where an express power is conferred by the mortgage itself *authorizing* the mortgagee, or his agent, to take possession of the mortgaged property—for such is this case. Upon default, it is plain, that the title to the property at law became vested absolutely in the mortgagee, the only interest remaining in the mortgagor being a mere equity of redemption. The power to take possession and to sell is a power coupled with an interest, creating by contract a license in favor of the grantee which becomes irrevocable without his consent. It is an essential part of the consideration of the mortgage, and it can not, either in law or in good faith, be revoked by the grantor without mutual consent. To abrogate such a power would be to seriously impair the obligation of the contract. *Richer v. Kelly*, 10 Amer. Dec. 41, *note*. It, furthermore, carries with it every right reasonably necessary to its execution. Hence, it has been often adjudged, that where the owner of

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land sells goods situated on the premises to the defendant, a license to enter and take them is implied by the contract of sale. 2 Greenl. Ev. § 627; *Nettleton v. Sikes*, 8 Metc. 34. If it was necessary, therefore, to enter the premises of the mortgagor in order to reduce the property to possession and execute the power of sale, this the mortgagee, or his agent, could do in a peaceable and lawful manner without becoming a trespasser, unless a distinction could be made where he had been forbidden originally to enter the premises under reasonable apprehension of a breach of the peace. But on this point we express no opinion.—Code, § 4419. It is said in *Jones on Chattel Mortgages*: “To an action of trespass by the mortgagor against the mortgagee for entering the mortgagor’s premises and carrying away the mortgaged chattels, it is a good defense that the mortgage had been forfeited.”—§ 434. The principle is correctly stated, we think, at least as applicable to cases where the mortgage contains a power of sale vesting in the mortgagee an irrevocable license to enter and take possession on default. The precise point was so adjudged by the Supreme Court of Wisconsin, in *Nichols v. Webster*, 1 Chand. (Wis.) 203, and by the Supreme Court of Massachusetts, in *McNeal v. Emerson*, 15 Gray, 384. See, also, *Herman on Chat. Mortg.* § 96; *Satterwhite v. Kennedy*, 3 Strob. 457; *London Co. v. Drake*, 6 C. B. (N. S.) 798; *Sterling v. Warden*, (51 N. H. 217) 12 Amer. Rep. 80; 1 *Waterman on Trespass*, § 167. The case of *Thornton v. Cochran*, 51 Ala. 415, was clearly based upon the fact that the mortgagee carried with him a deputy sheriff, whom he had indemnified by bond, to “levy” upon the mortgaged property, and this was construed into a taking by threats, or constructive force.

The seizure of the property by the mortgagee, in such a case, should of course be effected without force or violence. The same rule must govern as in cases of recaption. It must not be perpetrated “in a riotous manner, or attended with a breach of the peace.”—3 Black. Com. 4; *Bobb v. Bosworth*, 12 Amer. Dec. 273. Subject to this limitation, the owner of personal property, wrongfully withheld from him, may have redress by his own act without resorting to the delay of litigation. But he proceeds at his own peril if he commit the slightest assault, or other breach of the public peace, for, if individuals were thus allowed to redress their own private injuries, the peace of society and good order of government would cease.

The court erred, in our opinion, in charging the jury that the power of sale in the mortgage, after default, would confer no right on the defendants to take possession of the mortgaged property, against the will or without the consent of the mortgagor.

The rule as to the measure of damages in cases of this nature

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is well settled. For a mere wrongful taking, unaccompanied with any acts of wantonness, malice or gross negligence, the measure of damages would be the *value of the plaintiff's interest in the property* at the time of the trespass, and not the value of the property itself. The mortgage debt, or other lien, held on the property by the mortgagee, or lienee, must be deducted by way of recoupment.—*Bird v. Womack*, 69 Ala. 390; *Waterman on Tresp.* § 623; *Jones on Chat. Mortg.* § 437; *Blodgett v. Blodgett*, 48 Vt. 32. The appellants, under this view of the law, should have been permitted not only to introduce the mortgage in evidence, but also to prove the amount of the mortgage debt remaining unpaid.

The principal who employs an agent is not responsible for an unauthorized trespass committed by the latter. He may, however, become liable by a ratification and adoption of an unindictable trespass committed in his name and for his benefit, if he have full knowledge of its tortious nature.—1 *Waterman on Tresp.*, § 28. If it had been shown that the letter from plaintiff to the defendant Street, which was carried to the latter by Machen, contained a correct version of the alleged trespass, and its contents were presumptively known to Street, this would be competent as tending to prove the fact of ratification. But the letter itself should have been produced, or else a proper predicate laid for secondary evidence of its contents.

The evidence introduced to show a special damage to plaintiff in his farming operations was irrelevant. No special damages are laid in the complaint, and, if they were, that sought to be proved would be too remote, speculative and contingent to be recovered.—*Pollock v. Gantt*, 69 Ala. 373; *Jones' Chat. Mortg.* § 437; *Burton v. Holley*, 29 Ala. 318.

The statement of the witness, Davenport, that the plaintiff *consented* to the taking of the mortgaged property by defendants was the assertion of a fact and not of a mere opinion. The nature of the consent could have been elicited on cross-examination.

It is competent always for a witness to give any pertinent reason for his accurate recollection of a fact to which he testifies. He may, therefore, state that he had consulted counsel in reference to a matter of disputation in evidence, but he should not be permitted to testify as to what the advice was.—*Adams v. Robinson*, 65 Ala. 586.

We can not see from the bill of exceptions that there is any evidence in this case supporting the charges of the court on the subject of exemplary damages. These charges were, for this reason, calculated to mislead the jury.

It was error to charge the jury that "if the *weight of evidence* is in favor of the plaintiff, he should recover damages." This

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was an invasion of the province of the jury. They are not compelled to find according to the mere preponderance of the evidence, unless it produces a reasonable conviction or satisfaction of the mind.—*Wilcox v. Henderson*, 64 Ala. 535; *Mays v. Williams*, 27 Ala. 267.

The judgment of the Circuit Court must be reversed and the cause remanded.

STONE, J.—I dissent from the opinion of the majority of the court, and think the rule declared will naturally lead to disorder and violence. Public peace is of more importance than the possession of a chattel, even by the rightful owner. In my opinion a mortgagee has no right to go on the premises of another, and there, without the consent, and against the pronounced objection of the mortgagor, take and carry away the chattel, even though the law day of the mortgage is passed, and the mortgage debt remains unpaid. I call such proceeding force; such force, as in the case of *Bobb v. Bosworth*, 12 Amer. Dec. 273, S. C. Lit. Sel. Cases, 81, it was declared authorized resistance by force. A seizure of one's own property can not, at one and the same time, be a lawful seizure, and yet authorize resistance by force. The two rights are incompatible. A taking of one's own property without process can be justified only when the circumstances are such that resistance to such seizure would be a tort and a trespass. This I understand to be the true rule. Such was, in substance, the rule declared in *Thornton v. Cochran*, 51 Ala. 415. The syllabus of that opinion is made part of the text in Wait's Actions and Def. vol. 6, 97. See, also, same vol. 120; *Huppert v. Morrison*, 27 Wisc. 365. I think my brothers have departed entirely from the principle declared in *Thornton v. Cochran*, *supra*. See, also, *Turnley v. Hanna*, 67 Ala. 101; Cooley on Torts, 168; *Churchill v. Hulbert*, 110 Mass. 42; S. C. 14 Amer. Rep. 578; 1 Hil. on Torts, 204.

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Trover by Consignor against Agent of Common Carrier and Purchaser for Conversion by Illegal Sale of Goods held for Charges.

1. *Sale by common carrier of freight; good faith and diligence required.* An agent of a common carrier is not only held to good faith in making a sale under the statute of packages held for freight, but also to reasonable

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diligence in ascertaining and giving notice of the contents of the packages.

2. *Same; what reasonable diligence implies.*—Reasonable diligence in such case requires that the agent must examine all external indicia and marks on or about the packages, and all other sources of information, reasonably within his reach; but he is neither required nor authorized to break or open the packages for the purpose of ascertaining their contents.

3. *Same; when agent and purchaser liable to owner.*—If the agent knows the contents of the packages, or has good reason for believing what they are, and, withholding such knowledge or well-founded belief, he makes the sale to a favorite having superior knowledge, and at a nominal price, this constitutes a fraud which subjects the perpetrators to an action for damages, at the suit of the party injured.

4. *Same; diligence and good faith, questions for the jury.*—Whether the agent knew, or could have learned, or had just grounds for believing what were the contents of the packages, and whether he acted in good faith in giving the notice prescribed by statute, and in making the sale, are questions for the jury, under appropriate instructions from the court.

APPEAL from Hale Circuit Court.

Tried before Hon. GEORGE H. CRAIG.

This was an action of trover, brought by Nathan Bros. against J. M. Shivers and A. M. Fowlkes, to recover damages for the alleged conversion of two barrels, containing seventy-nine 17-100 gallons of whiskey; was commenced on 30th July, 1879, and was tried on the plea of the general issue, with leave to give in evidence any special matter of defense, the trial resulting in a verdict and judgment for the plaintiffs.

As shown by the bill of exceptions, Nathan Bros. shipped from Philadelphia, Pennsylvania, on the 30th March, 1878, the two barrels of whiskey in controversy, consigned to A. Stollenwerck, at Greensboro, Alabama. At that time the Selma, Marion & Memphis railroad, a connecting line, running from Marion Junction, in this State, to Greensboro, was in the possession of the defendant Fowlkes, as receiver, by the appointment of the Chancery Court of Perry county, and was by him, as such receiver, operated as a common carrier under the orders and direction of said court. On 6th April, 1878, the whiskey was received at Marion Junction and transported over said railroad to Greensboro. On 8th April, 1878, the consignee was notified of its arrival, and of the charges thereon; but he refused to receive it, or to pay the charges, on the ground that he had never ordered it consigned to him. The two barrels were described in the "through freight list or bill of lading" as "2 Bbls. Wet." No demand having been made for these barrels, and the freight not having been paid thereon, Shivers, acting under the direction of Fowlkes, on the 4th of December, 1878, advertised them, with other articles held for charges, for sale for the payment of the charges thereon, in a newspaper published at Greensboro; and on the 3d January, 1879, the day

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appointed for the sale, they were sold by Shivers at the depot at Greensboro, at public outcry, and were bid in by him for Fowlkes at \$12.50, the amount of the charges and expenses of sale. In the advertisement of the sale the barrels were described as "two barrels, wet, consigned to A. Stollenwerck." On 11th January, 1879, the two barrels were shipped to Marion, Alabama, for Fowlkes, and on the same day were sold by him to a party at Marion, as containing fifty-seven gallons of whiskey, at \$2.00 per gallon. The whiskey was shown to have been worth at Greensboro \$3.00 per gallon.

The plaintiff also introduced evidence tending to show that both defendants knew or had information of the contents of the barrels prior to the sale. Both Shivers and Fowlkes were examined as witnesses on their own behalf, and they testified that they had no knowledge of the contents of the barrels until after the sale, Fowlkes further testifying that "his information in respect thereto was confined to that afforded by the through freight list or bill of lading which came with the said property." The defendant Shivers further testified, that on the 4th of December, 1878, he again demanded of Stollenwerck, the consignee, the charges due on the barrels, and that Stollenwerck refused to pay said charges, or to receive the barrels, "and gave as his reasons therefor, that he had never ordered them to be shipped, and that they contained stuff which had to be 'doctored' before it could be sold, and he did not wish to deal in it. Until this conversation witness had no information of the nature of the contents of said barrels, except such as was imparted by the description in the bill of lading which came with them, nor did he know that Nathan Bros. were the consignors thereof. Upon hearing that they were consignors, he immediately, on the same day, gave notice to, and made demand on them for said freight and charges by postal card mailed to them at Philadelphia." He further stated that he saw on said barrels no such brands as showed their contents to be whiskey; that whiskey barrels were very frequently used for the shipment of other liquids, such as mineral water, vinegar, and the like, and that the brands or marks on such barrels very often do not show their real contents. It was also shown by the defendants, that it was the usage and custom of common carriers, in advertising freight for sale, to describe it as it was described in the freight list or bill of lading.

Exceptions were reserved by the defendants to charges given by the Circuit Court, and to charges requested by them and refused by the court. The rulings of the Circuit Court in its instructions to the jury are, for the purposes of this report, sufficiently stated in the opinion.

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THOS. SEAY, for appellants.—(1) The sale was fair and in exact accordance with the terms of the statute (Code of 1876, § 2141); and the sale was not made until after the goods had been lying in the depot for over six months. (2) The description of the property in the advertisement of sale was the only description that could have been obtained without committing a conversion of plaintiff's property; and it was in exact accordance with the bill of lading, and with a well recognized and established custom. (3) If the law be as charged by the court below, a very great and unnecessary hardship rests upon common carriers; the requirement that every package shall be examined, and the responsibility incurred by an inaccurate description of the goods would very much embarrass the operation of common carriers, especially in the centers of trade.

JAS. E. WEBB, *contra*.—(1) The sale of the whiskey was illegal, because a carrier's power to sell goods for freight is purely statutory.—Redfield on Carriers, § 283. For his power to sell, the carrier must rely on our statutes.—Code 1876, §§ 2140–1. This statute, being an inroad on the common law, must be strictly construed, and strictly pursued.—30 Ala. 591; 20 Ala. 189; 20 Ala. 544; 19 Ala. 43. (2) The sale was illegal, because no advertisement *describing* the property was made. The advertisement of "two barrels wet" did not convey to the mind of bidders the least idea as to the character of what was to be sold. The purpose of the statute, as declared in *Western Railroad Co. v. Rembert*, 50 Ala. 25, is to authorize a carrier to be released from responsibility "without detriment to the owners or consignee." (3) Trover lies in this case. See 2 Hilliard on Torts, pp. 101 and 110; 21 Ver. 204; 44 Maine, 491; Redf. on Carriers, p. 220, § 298; *Chandler v. Belden*, 18 John. 157; *Gracie v. Palmer*, 8 Wheat. 605; 2 Wait's Act. and Def. pp. 58 and 61; *Briggs v. Boston R. R. Co.*, 6 Allen, 246; 33 Me. 438; Angel on Carriers, § 431, p. 364, and authorities there cited; Redf. on Carriers, §§ 706, 710, and authorities there cited. (4) Nathan Bros. were the proper parties to bring the suit.—Angel on Carriers, § 495, note 6, p. 414, note 1, p. 415, note 3, p. 415, and authorities cited; *Swan v. Shepperd*, 1 M. & R. 224; 2 Hilliard on Torts, pp. 443–4, and authorities cited.

STONE, J.—In form, the railroad, in the present case, appears to have pursued the letter of the law, in the matter of advertising and selling the packages or barrels, for the payment of the freight charges. We say the railroad, for all this was the act of the railroad, although in fact done through its agents or employees. To the railroad corporation the freight charges were due, the freight was in the railroad's depot, and the cor-

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poration, or its appointee or agent, could make the sale. Corporations act by their agents or officers.—Code of 1876, §§ 2140 *et seq.*

But in making such sale, good faith and reasonable diligence must be observed. The agent or agents entrusted with the duty, must have employed reasonable diligence in ascertaining the contents of the barrels; and if they had information of what the contents were, or could have acquired such information with reasonable diligence, then it became their duty to give notice of it, so as to effect the best sale they could. This was their duty to the owners of the freight, and to the railroad corporation. If, knowing the contents of the barrels, or having good reason for believing what they were, the agent selling withheld such knowledge, or well founded belief, and the effect was that the barrels were sold to a favorite, having superior knowledge, and at a nominal price, this was a fraud which would subject the perpetrators of it to an action for the damages, at the suit of the party injured. The law will not sanction or excuse such faithlessness in an agent.—*Sarjeant v. Blunt*, 16 Johns. 74; *Wright v. Spencer*, 1 Stew. 576.

The Circuit Court ruled, in this case, that the advertisement under which defendants effected the sale was insufficient, in that it did not describe the contents of the barrels; and that in order to give a proper description, "the defendants had the right to examine the contents of the barrels." The description given in the advertisement was "two barrels wet." The testimony was, that this was the description given of the barrels in the bill of lading which accompanied them. We feel justified in inferring that this description was intended to indicate the contents, as distinguished from dry barrels. These were wet barrels, in the classification of freight. In two respects the Circuit Court erred: *First*, in holding, as matter of law, that the advertisement was insufficient; and, *second*, in ruling that the defendants were authorized to examine the contents of the barrels. As we have said, reasonable diligence and good faith were exacted. Reasonable diligence implies that the agent should have examined all external indicia and marks, the odor of the barrels, if they emitted an odor, and all other sources of information, reasonably within his reach. If, from these sources, or from any information he may have received, he knew, or could have known the contents with proximate accuracy, then his conduct in advertising as he did was culpable. He should have informed the public of all he knew, or could have learned with reasonable diligence. He stood in the relation of agent, both to the railroad corporation and to the owner of the barrels, and he owed to each of them good faith. He had no authority to open the barrels to ascertain their contents.

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Whether he acted with reasonable diligence in ascertaining the contents—whether he knew, could have learned, or had just grounds for believing what were the contents, and whether he acted in good faith in giving the notice and making the sale, were questions for the jury, under appropriate instructions embodying the principles above declared.

Shivers testifies he bid in the barrels for Fowlkes, at whose instance he advertised and made the sale. Being his agent or employe both to sell and buy, we need not inquire as to the separate liability of Fowlkes. The same duties and liabilities rested on the latter, as did on the mere instrument by which he effected the sale.

Reversed and remanded.

Cowley v. Shelby, Trustee.

Bill in Equity to Foreclose Mortgage.

1. *When an agreement is res inter alios acta.*—Where an owner of a tract of land sold it on a credit, and the purchaser having failed to pay the purchase-money, by agreement between the parties, another was substituted as purchaser, who assumed the payment of the purchase-money, and to whom a conveyance was afterwards made by the vendor, an agreement made between the first and second purchasers prior to the execution of the conveyance, that the second purchaser should be put in possession of the land at a given date, is, as to the vendor, *res inter alios acta*, and is not binding on him.

2. *When terms of mortgage can not be varied by parol.*—In a suit in equity for the foreclosure of a mortgage on land, it is not competent for the mortgagor to prove by parol evidence that he intended to convey an interest in the land different from that specified in the mortgage.

3. *Discharge of prior mortgage enures to benefit of junior mortgagee.* Where two mortgages on the same land are executed, the second or junior mortgagee acquires all the rights of the mortgagor, subject to the conditions of his mortgage, and to the prior incumbrance; and hence, the discharge of the prior mortgage, by a payment of the debt secured thereby, enures to the benefit of the junior mortgagee, and not to the benefit of the mortgagor.

4. *Mortgage; when secured note sufficiently identified.*—A note is sufficiently identified as being the note secured by a mortgage, when it is identical with the note described in the mortgage, as secured thereby, in dates, amount and in the names of the maker and payee, although, in the mortgage, the payee is described as trustee, while in the note the word *as* between the name of the payee and the word “trustee” is omitted.

APPEAL from Madison Chancery Court.

The record does not disclose the name of the chancellor before whom the cause was heard.

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The bill in this cause was filed on 13th January, 1879, by David D. Shelby, as trustee under a certain deed of trust, against Matthew M. Cowley and William M. Rozell, and their wives, to foreclose a mortgage on lands, executed by the defendants to the complainant. The complainant, as trustee, being seized and possessed of a certain tract of land in Madison county, sold the same to one Simmons on a credit, agreeing to execute a conveyance of the land on payment of the purchase-money. Simmons failed to pay for the land, and, by agreement between the parties, Matthew M. Cowley and William M. Rozell were substituted as purchasers, they agreeing to pay the complainant the balance due from Simmons, principal and interest, for which they jointly executed two notes, dated 4th August, 1877, one for \$1,740.60, payable on 1st January, 1878, and the other for \$1,860.60, payable on 1st January, 1879; and the complainant executed a deed conveying said land to them, they, together with their wives, at the same time executing to him the mortgage which is sought to be foreclosed, as security for the payment of the notes. The notes are payable to "David D. Shelby, Trustee," while the notes secured by the mortgage are described therein as payable to "David D. Shelby, as trustee, etc." The mortgage conveys not only the land above mentioned, but also "whatever right, title or interest, legal or equitable, which they, the said Mathew M. Cowley and his wife, Martha E. Cowley, have in and to" another tract of land in said county, which Matthew M. Cowley had previously purchased from the complainant, as such trustee, on a credit, of the purchase-money of which he had paid about \$1,000, leaving a balance of about the same amount unpaid. Afterwards, and before this bill was filed, this balance was also paid by Cowley. When the last mentioned tract was sold to Cowley, he and his wife executed a mortgage to the complainant, securing the purchase-money; and this mortgage is referred to in the mortgage sought to be foreclosed. The notes executed by Cowley and Rozell are set out in the bill, *in hæc verba*, and the mortgage securing them is made an exhibit.

The defendants filed a joint answer, and asked that it might be taken and considered as a cross-bill. In their answer they admit the execution of the mortgage, and of two notes secured thereby, but deny that the notes set out in the bill are the notes they signed or are the notes secured by the mortgage. They further alleged that at the time of the execution of the mortgage, it was expressly agreed that, as to the tract containing one hundred and sixteen acres, the mortgage should only include and embrace the interest which Cowley had therein, and that his interest was then estimated at \$1,000; that said mortgage was only intended to be an incumbrance on said tract to

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the extent of \$1,000, which they offer to pay; and that the first mortgage was not discharged "for the benefit of the said second mortgage, but for the sole benefit of Cowley and wife, and for the purpose of placing the land conveyed thereby in such condition as would enable them to "raise money on it and pay off said one thousand dollars, and discharge the same from said second mortgage." It is further averred, that Cowley and Rozell purchased the lands in January, 1877, with the distinct understanding and agreement, that they should have immediate possession thereof; but that the trade was not consummated, and possession not given them until in August, 1877, and that they were thereby damaged in the sum of \$1,000, which they seek to set off against the complainant's demand. The facts from which the damages are claimed to have resulted are averred, but a statement thereof is not necessary to an understanding of the opinion. The complainant in the original bill answered the cross-bill, averring the identity of the notes set out in the original bill with those secured by the mortgage, and that he had no individual interest therein; denying any agreement in reference to the tract containing one hundred and sixteen acres other than that evidenced by the mortgage, and denying any agreement on his part to deliver immediate possession of the lands to the defendants. He also incorporated into his answer a demurrer to the cross-bill.

The deposition of the defendant Matthew M. Cowley was read in evidence on behalf of the defendants. He testified that he considered, at the time he executed the mortgage, that the tract containing one hundred and sixteen acres was bound only to the extent of \$1,000, the amount which he had paid thereon, and that the mortgage was executed with that understanding on his part; but he does not testify to any positive agreement to that effect. He further testified that he had an agreement with Simmons, in January, 1877, that he and Rozell were to have the immediate possession of the land which they purchased from complainant, but that he did not have any agreement with the complainant to that effect. To this testimony the complainant objected, and his objection was sustained by the court.

On the hearing, had on pleadings and proof, a decree was rendered, foreclosing the mortgage as prayed; and that decree and the ruling on the evidence above noted are here assigned as error.

BRANDON & JONES, for appellants.

WALKER, & SHELBY, *contra*.

SOMERVILLE, J.—The contract between the appellant
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Cowley and Simmons, by which the latter agreed to put Cowley in possession of the lands in controversy by a given date, was *res inter alios* so far as concerns the appellee, Shelby. It is not shown that Shelby had anything whatever to do with this agreement, and it can not be made the basis of any claim of damages against him in this suit.

It was very clearly not competent for the appellant to prove by parol evidence that he intended to mortgage an interest in the land, described as a tract containing one hundred and sixteen acres, different from that specified in the mortgage executed to Shelby by him, dated August 4, 1877. This would be a most manifest violation of a well established rule, which forbids the admission of extrinsic evidence for the purpose of varying the legal effect of written instruments. The mortgage itself must be the sole expositor of its own terms, as between the parties to it at least.—1 Brick. Dig. p. 865, § 866 *et seq.*; *Cunningham v. Milner*, 56 Ala. 522.

Where a mortgage is given on real estate, the mortgagor is regarded as the owner of the fee, as against all the world except the mortgagee.—*Denby v. Mellgrew*, 58 Ala. 147. In cases where more than one mortgage is given on the same property, the second or junior mortgagee acquires all the rights of the mortgagor, subject to the condition of his mortgage, and to the pre-existing incumbrances, and when the latter are removed, it is as if they had never existed. The discharge of such prior incumbrances, therefore, must enure to the benefit of the junior mortgagee, and not to that of the mortgagor, although he may himself discharge them.—*Gardner v. Morrison*, 12 Ala. 547; 1 Jones on Mortg. § 679, § 676, and § 11. Even where the junior mortgagee removes such incumbrances, in order to protect his own title, there can be no redemption of the mortgaged property by the mortgagor without reimbursement. *Grigg v. Banks*, 59 Ala 311.

The notes copied in complainant's bill were sufficiently identified as being the same intended to be secured by the mortgage. They were identical in dates, amounts, in the names of the maker and of the payee, and contained a recital that they were given for the purchase-money of land. It is true that the mortgage purported to be given to secure notes executed to Shelby *as* trustee, etc., and in the notes themselves the word *as* is omitted before the word *trustee*, rendering the phrase following the payee's name a mere *descriptio personæ*. This omission was, however, supplemented, if such was needed, by an averment on the part of the trustee, Shelby, disclaiming any individual or personal interest in the notes. This was explanatory of possession, and admissible evidence in behalf of the

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trustee as a declaration against interest.—*Chambers v. Falkner*, 65 Ala. 448.

It is needless to consider the objections to evidence interposed by the appellant, as they would be unavailing to affect this decision, even if they were well taken.

The decree of the chancellor is affirmed.

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Bill in Equity to Foreclose Mortgage.

1. *Bill to foreclose; subsequent purchaser proper party.*—An administrator having executed a mortgage on lands to indemnify the sureties on his official bond, reserving possession to himself until his liability should be judicially ascertained, a subsequent purchaser under execution against the administrator, prior to the settlement of his administration, holds in subordination to the rights of the sureties under the mortgage; and one of the sureties, having paid the decree rendered against them and their principal on settlement of his administration in a court of equity, may maintain a bill to foreclose the mortgage against the mortgagor and the purchaser at execution sale, the latter having recovered possession by action at law against the mortgagor.

2. *Bill to foreclose mortgage executed by administrator to indemnify surety; averment of administrator's default.*—The bill in such case must show, by appropriate averments, that the administrator was in default; and averments of the filing of the bill in the administration suit, and of the proceedings had, and decree rendered therein, are insufficient as against the purchaser, who was not a party to that suit.

3. *Effect of decree as evidence.*—The decree rendered in the administration suit does not conclude the purchaser, and is competent evidence against him in the foreclosure suit merely to prove the fact of its rendition, and amount; it is not competent evidence, as against him, of the liability or default of the administrator.

4. *Cross-bill; when can not be maintained.*—In a suit for the foreclosure of such mortgage, the mortgagor can not maintain a cross-bill to have the execution and levy under which the purchaser bought, declared void. Such claim is purely a legal demand between the mortgagor and the purchaser, a co-defendant, in which the complainant, the mortgagee, has no concern whatever, and is not the proper subject for a cross-bill.

APPEAL from Greene Chancery Court.

Heard before Hon. A. W. DILLARD.

The bill in this cause was filed on 31st October, 1877, by Robert B. Dunlap against Henry A. Tutwiler, A. S. Steele and others, to foreclose a mortgage on lands executed by the defendant Steele to the complainant and others. The averments of the bill necessary to a proper understanding of the opinion, are stated in the opinion. The defendant Tutwiler, who was in possession of part of the mortgaged premises, claiming title un-

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der sheriff's sale made under an execution issued from the Probate Court of Greene County after the execution of the mortgage, answered the bill, incorporating in his answer a demurrer, the grounds of which may be stated as follows: 1. That it appears from the bill that the lands which are sought to be sold under the mortgage, or so much thereof as are held and claimed by this defendant, were recovered by the judgment of the Circuit Court of Greene county, and that he was put into possession thereof by the sheriff under a writ of possession; and that he is in the adverse possession of the said lands under an independent legal title, and in no wise holds the same in subordination to the right or title of A. S. Steele, the mortgagor of the complainant. 2. That a court of equity has no right to foreclose the said mortgage as against the adverse possession and independent title of defendant to the lands recovered by him. 3. That a court of equity has no right or power to decide upon the conflicting rights and titles of complainant under his mortgage, and of defendant under his purchase at sheriff's sale. 4. That the mortgage sought to be foreclosed, as shown by the bill, contains a power of sale, and that the complainant's remedy at law is complete and adequate. The defendant Tutwiler also moved to dismiss the bill for want of equity.

The defendant Steele answered the bill, and also filed a cross-bill, charging, upon allegations contained therein, that the execution issued out of the Probate Court of Greene county, under which the lands bought by Tutwiler were sold, and the levy and sale made thereunder were void, and seeking to have them so declared and decreed; and that he be decreed the owner of the equity of redemption free from any and all claims of the said Tutwiler, and further that he be entitled to redeem. The view taken of the cross-bill by this court renders it unnecessary to set out its averments. To the cross-bill the defendant Tutwiler interposed a demurrer, assigning, among other grounds, that the bill has no equity, because it is not confined to the subject-matter of the original bill, but introduces new and distinct matters not involved in the original bill; and that it is not connected with or necessary to the decision of the matters contained in the original bill. He also moved to dismiss the cross-bill for want of equity.

The demurrer to the original bill was overruled; and upon final hearing, had upon pleadings and proof in both the original and cross suits, the chancellor caused a decree to be entered, granting the complainant in the original bill the relief prayed, overruling the demurrer to the cross-bill, and the motion to dismiss it for want of equity, declaring that the execution issued out of the Probate Court of Greene county, under which the lands purchased by Tutwiler were sold, and the levy and sale

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made thereunder were void, and perpetually enjoining Tutwiler from asserting any claim or title under his purchase. From that decree the defendant Tutwiler appealed to this court, and here assigns as error these several rulings of the Chancery Court, and also its ruling on the admissibility of certain evidence offered by the complainant in the original bill, which is sufficiently indicated in the opinion.

WEBB & TUTWILER, for appellant, after discussing other questions raised by the record, but not passed on by the court, contended: (1) The cross-bill is not germane to the original bill, but "relates to matters, rights or equities which have no connection with it, and which are independent and distinct from the matter and object of the original bill. A cross-bill, not pertinent to the original bill, and which seeks no relief against complainant, is without equity, and should be dismissed."—*Andrews v. Hobson's Adm'r*, 23 Ala. 219, and authorities there cited; *Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *Winn v. Dillard*, 60 Ala. 369. (2) The record and decree in the case of Harriet M. and Mary F. Steele v. Andrew S. Steele and others, to which the appellant was a stranger, are not evidence against him of the facts necessary to authorize that decree, to-wit: that A. S. Steele, as administrator of E. B. G. Steele, owed Harriet M. and Mary F. Steele \$2,500.—*Troy v. Smith & Shields*, 33 Ala. 469; 2 Starkie on Ev. 183-4; 29 Ala. 147; 25 Ala. 161; 17 Ala. 681; 9 Ala. 973; 56 Ala. 356. The appellant was neither party nor privy to any one who was a party in that suit.—*Floyd v. Ritter's Adm'r*, 56 Ala. 356.

COLEMAN, CLARKE & McQUEEN, for the appellee Robert B. Dunlap. (1) There can be no doubt of the equity of the original bill, and that the demurrer thereto was properly overruled. A portion of the lands conveyed in the mortgage was not included in Tutwiler's purchase. Both Andrew S. Steele, and Tutwiler were, therefore, necessary parties.—*Mims v. Mims*, 35 Ala. 23; 19 Ala. 213. (2) Conceding that the execution under which the land was sold was not void, Tutwiler bought only the equity of redemption in the lands purchased by him, and he was "subrogated to all the rights of Steele, and subjected to all his disabilities."—Code of 1876, § 3209; *Coker v. Whitlock, Trustee*, 54 Ala. 180; *Welsh v. Phillips*, 54 Ala. 309; *Childress v. Monette*, 54 Ala. 317; *Carlisle v. Wilkins*, 51 Ala. 371; *Perkins & Elliott v. Mayfield*, 5 Porter, 182; 2 Brick. Dig. p 375, § 35. (3) The record and decree in the case of Harriet M. and Mary F. Steele v. A. S. Steele, *et al.*, was merely cumulative testimony. The material facts, and the payment and satisfaction of the decree by Dunlap, the surety, had been admitted by Tutwiler's

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answer; but the answer set up that this decree was a consent decree, which had been procured by the fraud of Dunlap in refusing to take an appeal to the Supreme Court, and that said decree was in no way binding on him. There is no evidence of any fraud. It is true that Tutwiler was not a party to this decree, and that he is not bound by it; but it is competent evidence to show that Steele on a final settlement of his administration of the estate of E. B. G. Steele, deceased, in the chancery court, was due \$2,500, and that a decree for that amount was rendered against Steele and his sureties; and that Dunlap, being one of them, was bound to pay the decree. Tutwiler has no right to complain that there was no appeal to the Supreme Court. He was in no way injured because an appeal was not taken.—Burge on Suretyship, Book 4, Chap. 1, p. 357; *Preslar v. Stallworth*, 37 Ala. 402; *Cave v. Burns*, 6 Ala. 780; 5 Wait's Act. & Def. pp. 204-7.

SNEDECOR, COCKRELL & HEAD, for the appellee A. S. Steele, after discussing other questions raised by the record, contended: The *subject-matter* of the original bill is the foreclosure of the mortgage, under the judicial ascertainment, under the facts put in issue, of the rights and interests of *Tutwiler* in and to the lands embraced in the mortgage. The cross-bill exhibited by A. S. Steele sets up more at large the facts which invalidate the claim of Tutwiler to the lands, and prays the court to decide upon the rights of all the parties. In this view, the court, under the allegations of the original bill, if a cross-bill had not been filed, "seeing" that persons of opposite interests are co-defendants, that the court can not determine their opposing interests upon the bill already filed, and that the determination of their interests is yet necessary to a complete decree upon the *subject-matter* of the suit, will direct a bill to be filed in order to bring the rights of all the parties fully and properly before it.—Dan. Ch. Prac. (4th Ed.) p. 1550.

STONE, J.—Andrew S. Steele, in July, 1859, was appointed administrator of the estate of E. B. G. Steele, deceased, and gave bond with Robert B. Dunlap as one of his sureties. In February, 1872, the said Andrew S. Steele, not having settled up his said administration, made a mortgage with power of sale, and therein conveyed to Robert B. Dunlap and others, his sureties, a tract of land of some thirteen hundred acres, to indemnify them against their liability as his sureties. The mortgage stipulated that A. S. Steel, the mortgagor, was to retain possession of the lands, until his liability as administrator was ascertained and determined by a proper decree of the court having jurisdiction thereof. In the spring of 1874, under execution

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from the Probate Court of Greene county, Henry A. Tutwiler purchased eight or nine hundred acres of the mortgaged land at sheriff's sale, and received the sheriff's deed therefor. The charge of Dunlap's bill in reference to said sale is, that the sheriff "sold all the right, title, claim and interest of the said Andrew S. Steele in and to said lands," and Tutwiler became the purchaser. No issue was made on this averment of the bill, except that it is claimed under the cross-bill that the executions under which Tutwiler purchased were void as against A. S. Steele. This question we will consider further on. Soon after his purchase, Tutwiler instituted his statutory real action against Steele for the recovery of said lands, and did recover them by the judgment of the court. That judgment was affirmed on appeal to this court.—*Steele v. Tutwiler*, 57 Ala. 113. In July, 1877, Tutwiler was put in possession of said lands under his recovery, and was in possession when this bill was filed by Dunlap—November 22d, 1877.

In May, 1875, the children, distributees of E. B. G. Steele, filed a bill against A. S. Steele and his sureties, including said Dunlap, to have a settlement of the said administration, and to recover their distributive interests. At the June term of the court, 1877, a decree was rendered in favor of the complainants in said cause and against Steele and his sureties for twenty-five hundred dollars, which Dunlap, the only solvent party, has had to pay. This bill is filed by him to obtain reimbursement out of the property mortgaged. There was a demurrer to the bill, assigning many grounds, and also a motion to dismiss on a specified ground. There was nothing in either of the objections specified. There is, however, a defect in the bill, in this, that it does not aver that Steele, the administrator, was in default as such administrator, or that he owed anything by virtue of his administration. The averment is, that "on or about the 26th day of May, 1875, the heirs at law of Ezekiel B. G. Steele, to-wit, Harriet M. Steele and Mary F. Steele, filed their bill in this court against Andrew S. Steele as the administrator of the said E. B. G. Steele and his sureties on his said bond, to-wit, your orator and Sidney P. Steele, calling the said Andrew S. Steele to a full and final settlement of his administration. Whereupon such proceedings were had in said cause, that a final decree was rendered therein at the June term, 1877, in favor of complainants against said defendants, for the sum of twenty-five hundred dollars and costs of suit. All of which will more fully appear by the papers in said cause, and the decree thereon rendered; and so much as may be necessary will be put in evidence on the trial of this cause." The foregoing is a copy of all the bill contains, tending to show A. S. Steele as administrator owed the complainants anything. It is wholly insufficient. Tutwiler

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was not a party to that suit, and was not concluded by anything found or determined in that cause. It was *res inter alios acta*—a proceeding to which he could not be a party, and there was no privity between him and either of the parties to that suit, which could make the adjudication binding on him. True, his rights were subordinate to those of Dunlap, but he was entitled to his day in court, to controvert the extent of Dunlap's superior right, or whether in fact he had any.—*Snodgrass v. Br. Bank*, 25 Ala. 161; *Troy v. Smith*, 33 Ala. 469; *Marshall v. Croom*, 60 Ala. 121; *Donley v. McKiernan*, 62 Ala. 34; *Lankford v. Green*, 62 Ala. 314; *Floyd v. Ritter*, 56 Ala. 356.

There was objection to the admission in evidence of the decree rendered in the case of Harriet M. and Mary F. Steele v. Andrew S. Steele, Dunlap *et al.* This objection was rightly overruled. The record was competent evidence against the whole world to prove the fact of its rendering, and the amount of it. Therefore it was properly admitted in evidence. It was also evidence against Andrew S. Steele, the mortgagor, to prove his liability to Dunlap, by judicial ascertainment in a suit to which they were both parties. As against Tutwiler, it was evidence to prove *rem ipsam*, and nothing else. It was no evidence of the facts—the *devastavit* of A. S. Steele—on which it rested. The present case is even stronger than this. That decree was rendered by consent of parties. And that decree was the only evidence offered in the court below, to prove A. S. Steele's default, for which Dunlap had been made liable. The chancellor erred in granting relief on this testimony against Tutwiler.

With the exception of the omitted averment, indicated above, the bill clearly contains equity; and if it be shown that A. S. Steele was in default to the distributees of E. B. G. Steele, and the amount of such default, which Dunlap has been required to pay, to that extent Dunlap is entitled to relief. The decree of the chancellor, granting relief on the original bill, must be reversed, and the cause remanded, at the cost of Dunlap, the appellee.

It is objected to the cross-bill of A. S. Steele that it is not germane to the original suit, and should not, therefore, have been entertained. The purpose of the original bill, as we have seen, was to foreclose a mortgage made by A. S. Steele to Dunlap and others. Tutwiler was a necessary party, because he was in possession, and claimed a part of the land by a title later in its acquisition than the date of the mortgage under which Dunlap claimed. The purpose of the cross-bill was to recover, not from Dunlap, but from Tutwiler, a co-defendant, the *residuum* of the land, left after satisfying Dunlap's mortgage. A cross-bill is, in its nature and purposes, defensive to the original bill.

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If its object and effect be not to defeat a recovery by complainant, in whole or in part, or to modify the relief the complainant obtains, then it is not defensive in its purpose, and is not germane to the bill.—*Davis v. Cook*, 65 Ala. 617; *Cont. Life Ins. Co. v. Webb*, 54 Ala. 688; *Winn v. Dillard*, 60 Ala. 369, and authorities cited. The claim set up in the cross-bill is alone between Steele and Tutwiler, is a purely legal demand in which Dunlap has no concern whatever, and is not a proper subject for a cross-bill. The decree of the chancellor on the cross-bill is reversed, and a decree here rendered, dismissing it at the costs of A. S. Steele.

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Trespass quare clausum fregit.

1. *Evidence; provinces of the court and jury.*—While it is the province of the jury to determine the weight and sufficiency of evidence, after it has been introduced, it is always a question for the court to decide, whether there be any evidence on a particular point in a cause; and it is error for the court to submit that question to the jury.

2. *Parol evidence of contents of written instrument; when inadmissible.* When a relevant fact consists of the substance of a document or record, the writing must be produced as the best evidence of its own terms; and until its absence is satisfactorily explained, the fact can not be proved by parol.

APPEAL from Calhoun Circuit Court.

Tried before Hon. LEROY F. BOX.

This was an action of trespass *quare clausum fregit*, brought by W. M. Hames as the administrator of the estate of Sarah A. Cumming, deceased, against Enoch Brownlee and Hugh Brownlee, and was commenced on 21st August, 1873. The gravamen of the complaint is, that the defendant entered upon, and erected a dam across a stream of water flowing through, a designated tract of land belonging to the plaintiff's intestate. The cause was tried on issue joined on the plea of not guilty. It appears from the evidence, as set forth in the bill of exceptions, that the plaintiff's intestate was seized and possessed of the land described in the complaint at the time of her death, and prior thereto as far back as 1845; that about 1845, William Cunningham, under whom the defendants claim, owned a tract of land south of, and adjoining said land; that a creek running in the direction of said land, just before entering the southern portion thereof on the east, separates into two channels, one

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running nearly due west across said land, and the other in a south-westerly direction, across the south-east portion thereof, and entering the land formerly owned by Cunningham; and that these two channels afterwards come together, thus forming an island. On the channel south of this island, and on his own land, Cunningham, about the year 1845, erected a mill and dam, and for the purpose of retaining the water in his pond, which extended above the head of the island, he also erected a dam across the channel that runs north of the island. In 1868, the defendants, claiming under Cunningham, tore down the dam on the south channel and erected a new one in the same place; and afterwards they also built a dam on the north channel, but the location of this dam is not given. The evidence was conflicting whether these dams were of the same height as, or higher than, those built by Cunningham. The evidence for the plaintiff tended to show that they were higher, thereby causing damage to the lands of his intestate.

For the purpose of showing Cunningham's right to build the dam across the northern channel, the defendants examined as a witness General Harrison, who testified that about 1845 he was a member of a jury that had been summoned to view the land described in the complaint and decide what amount Cunningham should pay Mrs. Cumming for erecting the dam; that the jury met on the land, agreed on the amount and their finding or verdict was reduced to writing and signed by the jurors. The verdict was not produced and its absence was not accounted for; and the court, on plaintiff's motion, excluded what the witness had said in reference thereto. In response to a question put by the defendants, as to whether Cunningham and Mrs. Cumming made any agreement at the time the verdict was agreed to, by which the former was to have the privilege of building the dam, the witness stated that after the jury had agreed on, reduced to writing, and signed their verdict, they then informed the parties what they had done, and both of them assented to what had been done by the jury. The plaintiff having moved to exclude from the jury this answer of the witness, on the ground that the verdict was not produced, the defendants, before any ruling was made by the court, repeated their question as to any such agreement between the parties at said time and place; and the witness in reply then stated, that "Cunningham and Mrs. Cumming made an agreement at the time and place above stated, by which said Cunningham was to have the privilege of building a dam across the channel of the creek that runs north of the island, for which said Cunningham was to pay Mrs. Cumming fifteen dollars [the amount assessed by the jury]. In answer to a question propounded by the plaintiff's counsel, the witness said that no

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agreement was made between said Cunningham and Mrs. Cumming about Cunningham having the privilege of building a dam across the channel of the creek that runs north of the island, save what was contained in the written verdict of the jury, which was read to both Cunningham and Mrs. Cumming, and assented to by them." The plaintiff then renewed his motion to exclude. The defendants insisting that the witness had testified to an agreement between the parties independent of the verdict, the court "excluded from the jury all that the witness had testified was contained in the written findings of the jury, and all that said witness stated on his recollection of the agreement between Cunningham and Mrs. Cumming, when the recollection of the witness was of what was contained in the writing, but left it to the jury to determine, whether the witness had testified to an agreement between Cunningham and Mrs. Cumming, made independently of the writing; and whether he had stated such agreement from his recollection, independently of the writing." To this ruling the plaintiff excepted. The court, *ex mero motu*, charged the jury, in substance, that they must determine for themselves, whether the witness Harrison had testified that "the agreement made between Cunningham and Mrs. Cumming was included in the written verdict of the jury, or whether they made an agreement independent of said verdict, and if so, what their agreement was." To this charge the plaintiff also excepted. Exceptions were reserved to other rulings of the court, but they are not passed on by the court, and hence are omitted from this report. The jury returned a verdict for the defendants, on which judgment was rendered in their favor.

The rulings of the Circuit Court above noted are among the assignments of error made in this court.

JNO. T. HEFLIN, for appellant.—(1) The witness Harrison testified positively that no agreement was made between Cunningham and Mrs. Cumming, about Cunningham having the privilege of building a dam, save what was contained in the written verdict of the jury, which was read to Cunningham and Mrs. Cumming, and assented to by them. After this distinct statement by the witness, that the entire agreement was merged in the written verdict, it was error to allow secondary evidence of the contents of the verdict, without accounting for the absence of the primary evidence.—*Morton v. The State*, 30 Ala. 527. (2) The court erred in referring to the jury the determination of the question, whether the witness Harrison proved an agreement independent of the verdict of the jury. The plain meaning of the witness' testimony is, that the jury made a verdict, which was read to the parties, who assented to

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it, and that no other agreement was made between them. The court must decide what goes to the jury as evidence. The question of the admissibility of evidence is one of law to be decided by the court, which can not be referred to the jury. *Bilberry v. Mobley*, 21 Ala. 277; *Barnett v. Stanton*, 2 Ala. 195; *Wilson v. Calvert*, 8 Ala. 757; *Costillo v. Thompson*, 9 Ala. 937; *Pharr v. Bachelor*, 3 Ala. 237.

BRADFORD & BISHOP, *contra*.—(No brief came to the hands of the reporter.)

SOMERVILLE, J.—The court erred, we think, in submitting to the jury the question as to whether or not the witness Harrison had testified to any fact tending to prove an oral or parol agreement between Cunningham and Cumming, independent of the one in writing to which he stated they had given their assent. Whether there be any evidence on a particular point in a cause, is a question for the court always to determine. It is within the province of the jury to determine the weight and sufficiency of such evidence, after being introduced under the eye of the court.—1 Greenl. Ev. § 49; 1 Best. on Ev. § 82; 1 Phil. Ev. p. 5 (10th Ed.).

The verdict of the jury, appointed in the year 1845, to view the land upon which the defendants had constructed the mill-dam in controversy, and to assess the appropriate damages in the *ad quod damnum* proceedings, was proved by the same witness, Harrison, to have been reduced to writing and properly signed by the acting jurors, as was required by the then existing statute.—Clay's Dig. 377, § 5. The acquiescence of Cunningham and Cumming to the terms of this written verdict was attempted to be proved, and the statement of the witness, who was one of the jury of inquest, was explicit to the effect that there was no other agreement between the parties than their *verbal assent to the terms of this verdict*.

The verdict was not produced, nor was any attempt made to account for its absence, so as to lay a predicate for secondary proof of its contents. The court very properly excluded the evidence relating to the verdict and its contents, but submitted to the jury to say, whether the parol assent to the verdict was an independent oral agreement, by which the right was accorded to Cunningham to construct a dam across the channel of the stream upon which his mill was erected.

The rule is, that when a relevant fact consists of the *substance of a document*, or record, the *writing itself* must be produced as the best evidence of its own terms. Until the absence of the document is satisfactorily explained, in the usual and proper mode, the fact can not be proved by parol.

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1 Whart. Ev. § 61; 1 Brick. Dig. p. 848, §§ 623, *et seq.* §§ 667–678; 1 Greenl. Ev. § 510.

The court erred, therefore, in this ruling to the prejudice of the appellant, and for this error the judgment must be reversed.

It is unnecessary to consider the other rulings of the court, as they were based upon the erroneous view to which we have above alluded, and are not likely to arise again on a second trial.

Reversed and remanded.

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Application for Authority to Erect Mill-Dam.

1. *Proceedings to erect mill-dam; notice to jurors.*—Where in a proceeding under the statute for authority to erect a mill-dam, the sheriff, after selecting the jurors, and issuing notices for them to attend at the time and place designated, entrusted the notices for some of the jurors to the applicant to be served, who did serve them, and the jurors so notified attended and acted as jurors, this, in the absence of any statutory provision prescribing any particular mode in which the jurors were to be notified, and of injury resulting to the contestant, is not a reversible error.

2. *Same; effect of judgment of reversal on appeal.*—Where, in such a proceeding, this court, on appeal, reversed an order granting to the applicant authority to erect the dam, and remanded the cause, the order ceased to exist, and there was no necessity for the judge of probate to have entered of record the fact of reversal, or a revocation of the order; and such order, having been reversed and annulled, could not be pleaded in bar or in abatement of further proceedings on the application.

3. *Same; when application and writ sufficient.*—An application in such proceeding is not subject to demurrer on the ground that the place where the dam was to be erected is not definitely designated, when it avers that the applicant is the owner of the land on each side of the stream, the name of which is given, and the land is described by sectional subdivisions, township and range, and the side of the stream on which the mill is to be erected, is stated.

4. *Same; admissibility of testimony.*—In such a proceeding a question propounded by the applicant to a witness, calling for the purpose for which he examined the place where the dam was to be erected, and his answer thereto, that he examined it in reference to health, are permissible.

5. *Same; when findings of judge of probate will not be disturbed.* Where, in such a proceeding, after the inquest of the jury had been returned to the judge of probate, he heard other evidence introduced by both the applicant and contestant before making an order for the erection of the dam, this court will not, on appeal, revise and reverse the conclusions and findings of the judge, unless they are manifestly unsupported by the evidence.

6. *Same; on contest, a suit inter partes, as well as in rem; costs.* When the application in a proceeding to erect a mill-dam is contested, the proceedings assume the form and character of a suit *inter partes*, as

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well as *in rem*; and if the contestant is unsuccessful, he is properly taxed with the costs of the contest.

APPEAL from an order made by the Judge of Probate of Crenshaw county.

Tried before Hon. B. A. WALKER.

This was an application by Jesse Folmar, the appellee, for permission and authority to erect a dam for a water grist mill and gin across "King's Mill Creek," and was filed on 25th February, 1880, and was contested by George S. Folmar, the appellant, whose lands were ascertained by the inquest of the jury to be liable to damage from the erection of the dam. The cause was before this court at a former term on appeal by the present appellant, and is reported.—*Folmar v. Folmar*, 68 Ala. 120. After the cause was remanded, on the written application of the appellant, another writ of *ad quod damnum* was issued on the original petition, and a jury was summoned thereunder, who met at the place where the dam was to be erected, made and signed their inquest and delivered it to the sheriff, who returned it to the office of the judge of probate as required by the statute. On the day set for the further hearing of the application, the contestant appeared, and moved to quash the venire, the return of the sheriff and the inquest, on account of the manner in which the jury was summoned, the facts in reference to which are sufficiently stated in the opinion, and on the further ground that no order had been made quashing or otherwise disposing of the inquest and return made under the first writ. This motion having been overruled, the contestant then pleaded the inquest and return made under the first writ in abatement of the proceedings. Issue being joined on this plea; it was shown that no order had been made setting aside or vacating the said inquest and return, but that the only order made after such return was the order granting the petitioner's application, which was reversed by this court. This plea was also overruled. Thereupon the contestant demurred to the petition and to the writ of *ad quod damnum* on the ground, in substance, that neither designated definitely the place where the dam was to be erected. The averments of the petition, after stating the residence and age of the applicant, are as follows: "1st. That he is the owner in fee simple of the west half of the north-east quarter of section 33, township 9, range 19, a tract or body of land lying in said county and State; that a water-course known and called by the name of 'King's Mill Creek,' which is not a navigable stream, runs through said land, and that your petitioner is the owner of the land on each side of said water-course. 2nd. That petitioner proposes to erect a dam to the height of twelve feet across said

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'King's Mill Creek' on said above described land for a water grist mill and a water gin, which will grind and gin for the public, said mill and gin to be erected on the east side of said water-course." A copy of the application is attached to the writ and made a part thereof, and the writ commands the sheriff to summon the jury "to meet with you on the 15th day of April, 1881, on the west half of the north-east quarter of section 33, township 9, range 19, the place where said dam is proposed to be erected, as specified in said application," etc. The judge of probate overruled the demurrer, and the contestant then took issue on each of the findings of the jury, and denied that said findings were true.

The applicant examined as a witness before the judge of probate one J. L. Hawkins, who, having testified that he had made an examination of the place where the dam was to be erected, was asked by the applicant what did he examine it for; to which he replied that he was called on to examine it with reference to health, and did so. Exceptions were also reserved to a similar question propounded by the applicant to one W. T. Shows, and to the answer made thereto. To the question and answer the contestant duly objected, but the court overruled his objections and he separately excepted. Numerous other witnesses were examined on behalf of both the applicant and the contestant, but the opinion does not render it necessary to set out the substance of their testimony. After argument of counsel the judge of probate made and entered an order, reciting the proceedings had in the cause, granting the application, and taxing the costs of the contest against the contestant, and the other costs against the applicant.

Exceptions were reserved by the contestant to the several adverse rulings above noted, and to the final order, and those rulings and order are here assigned as error.

GAMBLE & PADGETT, for appellant.

GRIFFIN & WOOD, and J. D. GARDNER, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The statute under which these proceedings were had, devolves on the sheriff the duty of summoning the jury of inquest; not merely of citing or notifying, but of selecting the disinterested freeholders of the county who are to compose the jury. If it appeared that the sheriff had delegated to either party, applicant or contestant, the power of selecting the freeholders, or any or either of them, composing the jury, we will not say it would not be an error or irregularity, for

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which, on timely objection, the verdict of the jury should be quashed. That is not, however, the objection now made. The sheriff selected certain freeholders as members of the jury, addressed to them a written notice to appear on a day named, at a place where the dam was to be erected, and entrusted the notice to the applicant to be served. The notice, it is inferable from the presence of these persons at the time and place appointed, was served, and the inquest had and reported to the judge of probate. The statute does not prescribe any particular mode in which the jury was to be notified, and we can not perceive that the mode adopted by the sheriff has, or could work injury to the contestant.

2. When the former order of the judge of probate granting the application was reversed and the cause remanded, the order ceased to exist, and the cause stood in the plight and condition in which it would have been if the order had never been made. There was no necessity that the probate judge should have entered of record the fact of the reversal of the order, or that he should have entered a revocation of it. The order having been reversed and annulled, was not of course pleadable in bar or in abatement of further proceedings on the application.

3. The order conforms to the requisitions of the statute, and is not obnoxious to any of the causes of demurrer assigned. The applicant is averred to be the owner of the land on each side of the stream; the land is described by sectional subdivisions, township and range; the name of the water-course, on which side the mill and gin were to be erected, the kind of mill and gin, and the height of the proposed dam are precisely stated; and this is all the statute requires the application to contain. Code of 1876, § 3558.

4. The purpose for which the witnesses Hawkins and Shows had examined the place where the dam was to be erected, it was permissible for them to state, as well as the character of the examination they made.

5. The jury returned their inquest to the probate judge, finding that about one acre of the land of the contestant would be injured and overflowed by the erection of the dam, and assessing the damages resulting therefrom. They further, by their findings, negatived all injuries mentioned in the statute (Code of 1876, § 3569), which, if affirmatively found, would have required that the application should have been rejected. In reference to these matters the judge of probate heard other evidence introduced by the applicant and contestant, and upon such evidence and inquest made an order authorizing the erection of the dam. It is obvious this court can not assume to revise and reverse the conclusions and findings of the judge, unless they were manifestly unsupported by the evidence, which is

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not now affirmed.—*Nooe's Ex'r v. Garner's Adm'r*, 70 Ala. 443.

6. In all civil actions, under our statute, costs are taxed against the unsuccessful party. When the appellant intervened and contested the application to erect the dam, the proceedings assumed the form and character of a suit *inter partes* as well as *in rem*. The contestation being unsuccessful, he was properly adjudged to pay its costs. His wrongful contest created them. Affirmed.

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Ejectment.

1. *Homestead exemption in favor of tenants in common*.—Under the constitution of 1868, the right of homestead exemption attaches to lands owned and occupied by tenants in common; but the area of the homestead is not enlarged on account of their fractional interests in the land, so as to make up in quantity what is wanting in extent of ownership.

2. *Same; extent of*.—Where two tenants in common, entitled to homestead exemptions under the constitution of 1868, owned an undivided one-eighth interest each in a tract of land containing four hundred acres, and resided on the land, each on a separate eighty acre subdivision, their homesteads can not exceed an undivided one-eighth interest in eighty acres of the land each, to be so selected as to include their actual places of residence; and hence, neither of them can claim an exemption of his entire interest in the whole tract, although it amounted to less than eighty acres.

3. *Same; validity of mortgage executed without signature and assent of wife*.—As the homestead of the two tenants could not collectively embrace more than their interests in one hundred and sixty acres of the land, a mortgage jointly executed by them, purporting to convey the entire tract, is not void as to their interests in the balance of the tract, because it did not receive the voluntary signatures and assents of their wives.

4. *Same; when can not be recovered in ejectment against party in possession claiming under mortgage*.—Such tenants, having removed from the land after the execution of the mortgage, and the land having been sold under a power contained in the mortgage after their removal, can not recover in an action of ejectment brought by them against a party in possession claiming under the purchase at the mortgage sale, on the ground that the mortgage conveyed their homesteads, and, not having been executed by their wives, was void, in the absence of all evidence tending to show that they had ever selected or set apart their homesteads.

5. *Ejectment; when outstanding title in a stranger a defense*.—A party in possession of land, claiming under a purchaser at a sale made by a transferee of a mortgage under a power contained therein, can successfully defend an action of ejectment brought by the mortgagor for the recovery of the land, although the transfer of the mortgage and the sale under the power were so irregular as to convey only the mortgage interest, and not the legal title. In such case, the defendant is not a naked trespasser, but holds possession under claim, if not color of right; and so holding, it

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is enough to defeat the plaintiff's action for him to show an outstanding title in a stranger.

APPEAL from Greene Circuit Court.

Tried before Hon. Wm. S. MUDD.

The facts bearing upon the principal questions raised by the record, and decided by the court, are sufficiently stated in the opinion. The appellant, the defendant in the lower court, claimed under a mortgage executed by the appellees and another to Asa Johnson, in January, 1873. As shown by secondary evidence, after the loss of the writing was proved, this mortgage was transferred in writing by Johnson to Joel W. Jones & Co.; but the evidence does not show that the debt secured by the mortgage was also transferred. The mortgage gave the mortgagee "authority to take possession of said property at any time after the maturity of said debt, and sell the same for cash, after ten days' notice, for the satisfaction of said debt, in case the same shall not be paid on or before it falls due, at such place as he may deem proper." On 6th September, 1875, after default, Jones & Co., and the administrator of the estate of Johnson (Johnson having died after he made the transfer), jointly sold the land conveyed by the mortgage under the power of sale, and at the sale they were bid off by, and conveyed to one Roberts, who shortly thereafter re-conveyed to Jones & Co. At the time of the sale one Neal "was in the adverse possession" of the lands, upon whom no demand was made for them prior to the sale. Afterwards Jones & Co. recovered the lands from Neal in an action of ejectment, and sold them to the appellant, executing to him a bond for title, and putting him in possession.

The court charged the jury, *ex mero motu*, "that if they believed from the evidence, that the plaintiffs, Jack Freeman and Alfred Freeman, had wives and actually occupied said lands, and had their separate homesteads thereon, at the time the said mortgage relied on by defendant was executed, and their said wives did not join in said mortgage, then the said Alfred and Jack were each entitled to recover an undivided fifty acres out of the tract of four hundred acres in controversy, or an undivided one-eighth interest in said tract of four hundred acres, together with one-eighth of the fair rental value of said lands during defendant's possession." To this charge the defendant excepted, and asked the court in writing to give to the jury the following charges, each of which the court refused, and he excepted, to-wit: 1. "If the jury believe the evidence in this case, they must find for the defendant." 2. "That if the plaintiffs, Jack Freeman and Alfred Freeman, have never made any selection of a homestead, and no homestead has ever, in

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any way, been set apart or designated, then the invalidity of the mortgage offered in evidence on account of its not being signed by the wives, can not be set up by them in this suit."

3. "If the jury find that the plaintiffs, Alfred Freeman and Jack Freeman, after the mortgage to Johnson was executed, and before it was foreclosed, voluntarily left the possession and occupancy of said lands, with no fixed intention of returning and occupying them as a homestead; and if they further find that no selection of a homestead was made by them, and none had been otherwise claimed, designated, or set apart to them at or before the execution of said mortgage, or since, then the rights of homestead were waived, and they can not set up the invalidity of said mortgage, because not signed by their wives."

The charge given and the refusal of the court to charge as requested are here assigned as error.

J. B. HEAD, for appellant. (1) It is well settled that whilst a tenant in common may claim a homestead in the common property, he can claim only the given number of acres specified in the exemption law, and is entitled to no more to compensate for fractions of ownership.—*McGuire v. Van Pelt*, 55 Ala. 344, and later cases. (2) The plaintiffs are not entitled to recover any portion of the land, because there was no selection or other identification of the eighty acres claimed as a homestead, either before or at the time of the trial. It was impossible for the jury to allot a homestead, under the evidence, for they could not know exactly where the dwelling was situated, nor was there any evidence upon which they could act as to the value of the whole land or of any particular eighty acres. (3) There is nothing in the objections taken to the manner in which the mortgage was foreclosed. Conceding that it was irregular, or even invalid to pass the legal title, yet it would amount to an assignment of the mortgage, in equity, which is sufficient to connect Snedecor with the legal title, and show that he is not a trespasser. The plaintiffs must recover, if at all, on the strength of their own title; and the legal title being out of them, and defendant being connected therewith, there can be no recovery. *Bernstein v. Humes*, 60 Ala. 582.

GREEN B. MOBLEY, *contra*. (1) The appellees were entitled to their respective interests in the lands in controversy, as their homestead exemptions. The interest of each was an undivided one-eighth, or less than the number of acres exempted to them by the constitution. This case is distinguished from that of *McGuire v. Van Pelt*, 55 Ala. 344. In that case both mortgagors lived in the same house, and, of course, there being but one *home-place*, there could be but one *homestead*. In this case,

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however, there were two different and distinct home-places. See *Freeman on Executions*, § 243. (2) The homestead, whether a fee or any lesser interest in lands, can not be aliened without the voluntary signature and assent of the wife. Cons. 1868, Art. 14, § 2; *Watts v. Gordon*, 65 Ala. 546; *Halso v. Seawright*, 65 Ala. 431. See also 55 Ala. 344; 56 Ala. 340; 58 Ala. 62; 60 Ala. 302. The mortgage in this case was, therefore, void. (3) The mortgage being void, it could not afterwards become a valid conveyance. There was no necessity for any *claim* or designation of homestead. This case was before this court at a former term and is reported under the title of *Bradshaw v. Emory*, 65 Ala. 208. On that appeal plaintiffs' title was held good. (4) The record shows that the sale was made when the lands were in the adverse possession of one Neal. The mortgage required that the mortgagee should take possession before selling. The sale and conveyance made thereunder are, therefore, void. 2 Jones on Mort. § 1782; 7 Gray, 243; 97 Mass. 459. (5) The evidence shows that the mortgage was transferred to Jones & Co. Who then owned the debt? can the assignee of a mortgage exercise the power of sale, where another owns the debt?—Code of 1876, § 2198; 50 Ala. 198; 65 Ala. 285; *Ib.* 593.

STONE, J.—In this case several ejectments, being for the recovery of undivided interests in the same lands, were by consent tried together. The two plaintiffs, Jack Freeman and Alfred Freeman, recovered in the court below, and rulings in their cases raise the questions which are presented for our decision. Each sued for one-eighth undivided interest in a tract of four hundred acres—equal to fifty acres each—and each recovered a one-eighth undivided interest in the whole tract, and one hundred dollars as rents or mesne profits. We are not informed what became of the other suits.

The testimony tends to show that the two Freemans, Alfred and Jack, jointly purchased, together with four other named parties, the tract of four hundred acres, on an agreement expressed in the contract of purchase that Alfred and Jack were each to have fifty acres, and the other four purchasers each seventy-five acres. There was no partition or division of the lands, but they were held and occupied by the purchasers as tenants in common. This possession and common occupancy commenced about 1870 or 1871, and continued until the spring of 1874, when they all removed from the land, and have never returned to it. During the common occupancy there were on the premises three dwellings or cabins. One was occupied by a person not shown to have or claim any interest in the land. The remaining two were occupied severally as homesteads by

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Jack and Alfred Freeman, who were married men and had families. They resided three or four hundred yards apart, and on separate eighty-acre sub-divisions of the tract. They were thus occupying when the mortgage was executed, under which the claimants justify their possession.

In January, 1873, Jack and Alfred Freeman, with one other of the tenants in common, executed a mortgage to Asa Johnson, to secure a recited debt for advances to make a crop. This mortgage purported to convey the whole land, but neither wife of the several grantors joined in the mortgage. It will be observed that this mortgage was executed before the quantity of the homestead exemption was enlarged to one hundred and sixty acres by the statute of April, 1873. Hence, the quantity of the homestead these grantors could claim could not exceed eighty acres each.

In *McGuire v. Van Pelt*, 55 Ala. 344, and in *Blum v. Carter*, 63 Ala. 235, the question of homestead arose on the title of a tenant in common. We settled in those cases that the fractional ownership of the claimant of homestead did not enlarge the area of its operation, so as to make up in quantity, what is wanting in extent of ownership. We ruled that the homestead claim is limited to the quantity the statute or constitution prescribes; and that the claim is valid only for such interest, both in extent and duration of ownership, as the claimant owns. If the ownership be fractional, or less than a fee, then the exemption is fractional, and continues only so long as the title of the owner and occupant lasts. The homesteads in these cases being governed by the constitution of 1868, and in quantity not to exceed eighty acres, it follows that whatever homestead interest the plaintiffs could claim in these cases, must be confined to the extent of ownership each of them had in a separate eighty acres. The testimony shows they were each of them entitled to an undivided one-eighth interest in the tract; therefore, the homestead can not exceed an undivided eighth interest in eighty acres, so selected as to include the actual homestead of the claimant. In overlooking the principle declared above, the Circuit Court was betrayed into some important errors. The whole tract of land contained four hundred acres, and it is not shown it was ever partitioned. The claims of these plaintiffs are each limited to eighty acres—one hundred and sixty acres for the two. Whatever interest they had in the remaining two hundred and forty acres, they could not claim as homestead.

It is contended for appellees that there were gross irregularities in the transfer of the note and mortgage made to Johnson, and in the sale and conveyance under it. On this account it is alleged that the defendants are in possession under no valid title, and therefore the Freemans can recover on the strength

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of their original ownership. We consider it unnecessary to pass on the regularity of the transfer of the note and mortgage, and of the sale and conveyance under the latter. They at least conveyed the mortgage interest, and are enough to show that Snedecor was in possession under claim, if not color of right. He was not a naked trespasser. Holding under claim of right, it was enough to defeat the plaintiffs' action for him to show outstanding title in a stranger.—*Scranton v. Ballard*, 64 Ala. 402.

Another important question arises. The conveyance by the Freemans was of the entire tract of four hundred acres. The two homesteads could not, collectively, embrace more than one hundred and sixty acres. As to two hundred and forty acres, the conveyance was not void.—*McGuire v. Van Pelt*, *supra*. The record contains no evidence that the homesteads had ever been selected by the claimants. This was a necessary prerequisite to the right to sue for them. *Preiss v. Campbell*, 59 Ala. 635; *Nelson v. McCrary*, 60 Ala. 301; *Hardy v. Sulzbacher*, 62 Ala. 44; *Martin v. Lile*, 63 Ala. 406; *Garner v. Bond*, 61 Ala. 84.

The judgment of the Circuit Court is reversed, and the cause remanded.

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Action on Contract for Delivery of Lumber.

1. *Plaintiff suing as assignee of written contract for delivery of personal property must have and aver a written transfer.*—In order to authorize an assignee of a written contract for the delivery of personal property to sue thereon in his own name, he must have a written transfer of the contract; and a complaint by such plaintiff which fails to show a written transfer is defective on demurrer.

2. *Same; when complaint fails to show a written transfer.*—An averment in such complaint that the contract was "duly transferred" to the plaintiff is insufficient, as the transfer may have been by delivery merely, and not in writing.

3. *Same; what averment sufficient.*—But an averment in the complaint that the contract was "duly assigned," is sufficient, as this must be construed to mean a transfer in writing.

4. *Contract for delivery of personal property; place of delivery.*—Under a contract for the delivery of specific articles of personal property, which specifies no place of delivery, the general rule is, especially where such articles are cumbersome, that they are to be delivered at the place where they are situated, or are to be manufactured. In such case the vendor is not bound to send or carry the goods to the vendee, but is only required to deliver them on demand.

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5. *Same; when payable in money.*—Such a contract does not become payable in money, or the foundation of a suit for damages for a breach thereof, until there has been a demand by the purchaser or his assignee, and a refusal on the part of the vendor to deliver. (*Overruling Cobb v. Reed*, 2 Stew. 444, on this point.)

6. *Same; construction of.*—A contract by the owner of a saw mill for the delivery of a stated amount of lumber to a purchaser, one-half during the year 1877 and the other half during the year 1878, without designating the place of delivery, must be construed as an agreement on the vendor's part to deliver the lumber at his mill, one-half during each of said years, on the purchaser's demand; and until such demand is made, in the absence of facts dispensing with the necessity therefor, there is no default or breach of the contract.

7. *Same; from what date bears interest.*—Debts or obligations payable on demand do not bear interest until a demand is made, or suit is instituted; and hence, interest would run on such a contract only from a breach thereof.

APPEAL from Talladega Circuit Court.

Tried before Hon. LEROY F. BOX.

This action was brought by Arthur T. Wood against George L. Ragland, to recover damages for the breach of a contract, made by the defendant with one Henry W. Truss, which is in the words and figures following: "During the years 1877 and 1878, I promise to pay Henry W. Truss, a member of the firm of Truss, Wood & Co., forty-four thousand three hundred and ninety feet of merchantable, square-edged lumber, to be delivered, one-half during the year, 1877, and one-half during the year, 1878, as a part payment for the purchase of the said Truss' fourth interest in the saw mill this day conveyed by Truss, Wood & Co. to me.

G. L. RAGLAND."

February 5th, 1877."

The complaint contains two counts. The first count sets out the contract *in hæc verba*, and avers that it "had been duly transferred by the obligee thereof to plaintiff." The second count sets out the substance of the contract and avers that it "has been duly assigned to plaintiff." The suit was commenced on 16th February, 1880. The defendants demurred to both counts on the ground, among others, that it is not averred that the contract was assigned to the plaintiff in writing. The court overruled the demurrer to each count, and thereupon the defendant pleaded (1) non assumpsit, and (2) a special plea setting up, in substance, a modification of the original contract by agreement between the defendant and the plaintiff's assignee, to which a demurrer was interposed and sustained; but the averments of which need not be stated, as the question raised by the demurrer is not passed on by this court. The defendants also pleaded in short (3) payment, and (4) "set-off." As stated in the bill of exceptions, "issue was joined on the several pleas of defendant."

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On the trial, the plaintiff, against the defendant's objection, read in evidence the contract sued on, and a written endorsement thereon in these words: "For value received I hereby transfer the within note to A. T. Wood. Dec. 8th, 1879. Henry W. Truss." To the rulings of the court allowing the contract and endorsement to be read to the jury the defendant excepted.

The only other evidence introduced on the trial was the testimony of the plaintiff, which was as follows: "I bought the contract sued on from Henry W. Truss, and a few days before this suit was begun I called on the defendant at his house and informed him that I was the owner and holder of it, and that I wanted the lumber that was due on it from him. He replied that he could not then deliver the lumber, but would do so as soon as he could. I bought the contract on the day the endorsement is dated, and lumber was then worth one dollar per hundred feet at Ragland's Mill." On cross-examination the witness testified: "I did not demand of the defendant any particular amount of lumber. I told him that I wanted whatever amount of lumber that was due on the contract. I did not then know, and do not now know what amount was due when I made the demand, and I so told the defendant, and he said that he did not know what was due. I told him that if he and Henry W. Truss would get together and agree as to credits said contract was entitled to, I would allow them, and that Truss had told me that some sixty or sixty-five dollars had been paid on the contract, but had not been credited on it."

After the general charge, which is not set out in the bill of exceptions, the defendant asked the court in writing to give three charges to the jury. The court refused each of these charges and the defendant duly excepted. The refusal of the court to give the first and second charges is not assigned as error. The third charge is in these words: 3. "In this case no interest can be allowed except from the time Wood made the demand of the defendant; for until then there is no default shown by the evidence, his demand being the only one proven." The trial resulted in a verdict and a judgment for the plaintiff, and the defendant appealed.

The errors here assigned are the rulings of the court on the defendant's demurrer to the complaint, and on the plaintiff's demurrer to the second plea, and on the introduction in evidence of the contract and the endorsement thereon, and the refusal of the court to give the third charge requested by the defendant.

PARSONS & PARSONS, for appellant.—(1) The plaintiff claims as transferee of a written contract for the delivery of lumber.

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The provisions of section 2890 of the Code of 1876 do not, therefore, apply; but the complaint should show that the plaintiff has the legal title. The averments of both counts of the complaint are insufficient to show this, and the court erred in overruling the defendant's demurrers thereto.—*Phillips v. Sellers*, 42 Ala. 658; *Skinner v. Bedell's Adm'r*, 32 Ala. 44; *Henley v. Bush*, 33 Ala. 636. (2) Under section 2100 of the Code of 1876, it would seem that the maker of such an instrument as the one sued on in this case, may make such defense against it in the hands of an assignee, until notified of the assignment, as he could have made against the original holder, unless, in some way, he is estopped. If this be true, then the court erred in sustaining the demurrer to the second plea. That plea shows that the agreement, as to the delivery of the lumber, had been so changed while Truss held it, that the defendant was relieved from his undertaking to deliver the lumber according to the terms of the original contract; and was to deliver it as called for by Truss. This change entitled Ragland to a reasonable time within which to deliver the lumber, from the time of demand made by an assignee; and the plea shows that he was ready to do this. (3) The court should have given the third charge asked by the defendant. Conceding that the plaintiff was entitled to interest, it would seem that, suing for the breach of an agreement, he could not recover interest prior to the time when the defendant failed on demand to deliver the balance of the lumber due on the agreement. In such a case as this, a delivery of the lumber on demand, or a tender thereof, coupled with a readiness and ability to deliver, would be a full answer to the complaint.

BOWDEN & KNOX, *contra*.—The averments in both counts as to the transfer of the contract to the plaintiff are sufficient. *Andrews v. Carr*, 26 Miss. 577, cited approvingly in *Enloe v. Reike*, 56 Ala. 500; *Crosby v. Raub*, 16 Wis. 616; Byles on Bills, p. 236; *Partridge v. Davis*, 20 Vt. 499; Chitty on Bills, 256, 258; *Auerbach v. Pritchett*, 58 Ala. 451. In *Phillips v. Sellers*, 42 Ala. 658, it was said that the assignee of such a contract, by endorsement, might bring suit in his own name. The complaint in that case did not aver any assignment or transfer of the contract sued on, and, for that reason, was said to be defective; but it was nowhere said that a transfer in writing must be alleged *in totidem verbis*. On the contrary, it is clear from the opinion, that if an assignment or transfer had been averred, the complaint would have been good. But it must be remembered that the averment in this case is, not simply that the instrument sued on was transferred or assigned, but that it was "*duly transferred*," and "*duly assigned*."

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While this may be the averment of a legal conclusion, it is authorized by the Code; and, on a fair construction, it must be held to mean such a transfer as, under the law, would amount to a legal transfer. (2) The second plea is defective and no answer to the complaint. It sets up a parol understanding, which is not shown to have been supported by any consideration; and it shows, not only that defendant for more than two years after he had contracted to deliver the lumber failed to do so, but also that he was in no condition to do so, when demand was made. (3) The court properly refused the third charge asked by the defendant. Its vice consists in the assumption, that a demand was necessary to fix the defendant's liability, whereas all the decisions hold, that, in cases of this kind, no demand is essential, but a readiness to deliver when no demand is made, if it can be shown by defendant, is only matter of defense.—*Thaxton v. Edwards*, 1 Stew. 524; *Graham v. Abercrombie*, 8 Ala. 569. The contract itself fixes the liability. The obligation is to deliver the lumber, one-half during 1877, and the other half during 1878. On 1st January, 1879, therefore, the entire quantity of lumber mentioned in the contract was past due.

SOMERVILLE, J.—The contract here sued on is one for the delivery of property, and not for the payment of money, and a written transfer would be necessary in order to authorize an assignee to bring suit on such an instrument in his own name.—Code, 1876, § 2890. It is equally evident that a complaint would be subject to demurrer, which failed to aver, on the face of it, such written transfer of the legal title to the plaintiff bringing the suit.—*Phillips v. Sellers*, 42 Ala. 658.

The first count alleges that the obligation in question was “duly transferred” to the plaintiff. This was clearly insufficient, as it may have been transferred by mere delivery and not in writing. The second count avers that it was “duly assigned.” This, we think, must be construed to mean a transfer in writing, as distinguished from one by delivery, this being the true definition of the word when applicable to contracts, as indicated both by usage and etymology.—*Bouvier's Law Dict., title, Assignment; Enloe v. Reike*, 56 Ala. 500; *Andrews v. Carr*, 26 Miss. 577.

The demurrer was properly overruled as to the second count, but should have been sustained as to the first.

The rulings of the court below bear upon the proper construction of the contract sued on, which is an obligation on the part of the appellant Ragland to deliver a certain amount of lumber, of a quality particularly described. The promise is to “pay” the lumber to one Truss, who was the assignor of the

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plaintiff, Wood, during the years 1877 and 1878, one-half to be delivered during each of said years. The consideration recited is the purchase by Ragland of Truss' one-fourth interest in a saw mill. An important feature of the contract is, that it fails to designate *any place of delivery*.

The rule governing the place of delivery in cases of this kind is not entirely free from doubt, the authorities being in irreconcilable conflict. Where money is to be paid, it seems well settled that the payor must seek the payee, and make a tender of the amount due him, in the absence of a contrary stipulation. In the case, however, of specific articles, if no place of delivery is specified, the general rule is, especially when such chattels are cumbersome, that they are to be delivered at the place where they are, or are to be manufactured. The vendor, unless otherwise agreed, is not bound to send or carry the goods to the vendee. All that he is required to do, is to deliver *on demand* to the purchaser. Such an obligation does not become payable in money, and the foundation of a suit, until there has been a demand by the purchaser, and a refusal on the part of the vendor to deliver. The case of *Cobb v. Reed*, 2 Stew. 444, holding the contrary, is unsupported by principle or authority, and is overruled. This seems to us the sounder and more sensible rule, and better in harmony with the modern usages of commerce and customs of every day business.—Benjamin on Sales, § 679; 5 Wait's Act. & Def. 570; 2 Kent's Com. 505; *Lobdell v. Hopkins*, 5 Cow. 516; *Minor v. Michie*, Walker's (Miss.) Rep. 24; Bishop on Contr. 699 and cases cited; *Greenwood v. Curtis*, 6 Mass. 358; *Stevens v. Adams*, 45 Me. 611; *Johnson v. Baird*, 3 Blackf. 153.

And, generally, before any action can be maintained by the promisee in such cases, proof must be made that he was ready at the proper time and place to receive the chattels, or that the promissor was unable then and there to deliver them. A demand must be shown, or else proof made that such demand would have been nugatory.—2 Parson's Contr. 163.

The present contract must be construed to be an agreement on Ragland's part to deliver the lumber at his, the vendor's mill, one-half respectively during each of the years 1877 and 1878, *on demand* being made by the vendee. Until such demand by the plaintiff is proved, or facts shown which dispense with the necessity of making it, there is no default or breach of the contract by the defendant. Until there was a breach, there would be no interest accruing on the amount due to the plaintiff. Debts or obligations payable on demand do not bear interest until a demand is made, or suit is instituted.—*Maxcy v. Knight*, 18 Ala. 300; *Vaughan v. Goode*, Minor's Rep. 417.

Under this construction of the contract, the ruling of the

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court on the demurrer to defendant's second plea becomes immaterial, and there was manifest error in refusing to give the third charge as requested by the defendant.

Reversed and remanded.

Bragg, Adm'r, v. Beers.

Bill in Equity by Devisees and Legatees for a Final Settlement of their Testator's Estate, for a Sale of Lands devised for Partition, and for Distribution.

1. *Administration of estates ; jurisdiction of court of equity.*—Before the jurisdiction of the court of probate to settle an administration, and to make division and distribution, has been put in exercise, devisees or heirs, legatees or distributees may, without assigning any special cause, resort to a court of equity for a settlement of the administration, the payment of legacies, the distribution of personal assets, and the division of lands devised or descended.

2. *Sale of lands for partition ; when court of equity will take jurisdiction.*—While a court of equity, in the absence of a statute conferring the jurisdiction, will not decree a sale of lands held and owned jointly by adults without the consent of all of them, on a bill filed for that purpose alone ; yet, when the court takes jurisdiction of a decedent's estate, and to effect a final settlement, distribution and partition, a sale of lands is necessary, it will order the sale in all cases in which, under like circumstances, the court of probate would have had jurisdiction to order it.

3. *Bill in equity ; necessary parties.*—To a bill filed by a devisee and legatee for a settlement of his testator's estate, a sale of the lands devised for partition, and distribution of personal assets, mortgagees of the undivided interests of other devisees in the lands are necessary parties.

APPEAL from Mobile Chancery Court.

Heard before HON. JOHN A. FOSTER.

The bill in this cause was filed on 1st December, 1881, by Dora B. Beers and Mary Parker against Braxton Bragg, individually and as administrator *de bonis non*, with the will annexed, of John Bragg, deceased, Shirley Bragg, John Bragg, William B. Bragg, and others, and its material averments are as follows: John Bragg departed this life in the county of Mobile seized and possessed of certain real estate situate in the Port of Mobile, particularly described, which, by his will, he devised to his children, the complainants and the above named defendants. At the time of his death he was also possessed of some personal property, which he also bequeathed to his children. On the 4th of September, 1878, after the probate of the will, letters testamentary were issued thereon by the Probate Court of Mobile county to one of the executors nominated in the will, who

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continued as such executor until his death; and on the 5th of May, 1880, his executorship was finally settled in said Probate Court. On the 29th of April, 1879, the defendant Braxton Bragg was appointed administrator *de bonis non*, with the will annexed, of said testator, and thereupon duly qualified as such, and took possession of the assets of the estate, including the real estate devised. The testator, by his will, directs that the division of his estate should be postponed until his youngest living child should become of age, and that until that time all his estate, after the payment of debts, should be kept together by his executors, they to account annually for the income, rents and profits of his estate, which, after paying current expenses, should be annually divided among, and paid over to his said children.

The bill further avers, that the administrator has received assets of said estate more than sufficient to pay all outstanding debts; that he "has not rendered the annual account of the net income of the property devised, nor has he paid the same over as required by said will;" that he has only made one partial settlement of his administration; that payments had been made to the complainants and to the other devisees and legatees under said will on account of their respective interests thereunder, a statement of which is given; that more than eighteen months have elapsed since letters were issued to said administrator, and more than eleven months have elapsed since the youngest child of John Bragg, deceased, attained the age of twenty-one years; that complainants have been for a long time desirous that said estate should be finally settled, and the respective interests of the distributees should be paid to them, but that said administrator had taken no steps to attain that end; that the real estate devised is of such a nature that it can not be divided so as to give to each of the joint owners the part to which he or she is entitled, and they can not obtain their respective interests and rights except by a sale of the property and a distribution of the proceeds; and that neither Braxton Bragg nor the other brothers of complainants will consent to a sale of the property for partition. It is also averred that John, Shirley and William B. Bragg have mortgaged their respective interests in the real estate devised to certain parties therein named, and the mortgagees are made parties defendant to the bill; that the mortgages contain powers of sale, and the debts secured thereby are still unpaid; and that these mortgages would greatly embarrass a sale of the property had under proceedings at law for partition. The prayer of the bill is for a sale of the real estate devised for division among the devisees, a settlement of the administration of Braxton Bragg upon the estate of John Bragg, deceased, and a distribution of the per-

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sonal assets in accordance with the provisions of the will.

All the defendants except the mortgagees demurred to the bill on the grounds, among others, (1) that it appears on the face of the bill that the court had no jurisdiction to order the sale of the lands therein described for the purpose of a division among the owners thereof; (2) that it appears from the bill that its main object is to obtain a partition of the lands of said estate by a sale, and no special or equitable circumstances are shown why the court should assume jurisdiction of the administration of said estate and finally settle the same; (3) that the bill shows that the complainants have a complete and adequate remedy at law; and (4) that the bill is multifarious, in that it seeks a sale of lands for a division among joint owners, a final settlement of said estate, and said mortgagees are made parties defendant thereto, without showing that they had any interest in said final settlement, or are in any way concerned therein. They also moved to dismiss the bill for want of equity. The Chancery Court, on the hearing of the cause on demurrer and motion to dismiss, entered a decree overruling both, and from that decree this appeal is prosecuted under the statute, and the decree is here assigned as error.

PILLANS, TORREY & HANAW, and D. H. LAY, for appellants.

P. & T. A. HAMILTON and J. LITTLE SMITH, *contra*.

BRICKELL, C. J.—It is true that a court of equity, in the absence of a statute conferring the jurisdiction, will not decree a sale of the lands of an adult, to make partition, without his consent.—*Deloney v. Walker*, 9 Port. 497. The statutes confer on the court of probate jurisdiction to authorize the personal representative to sell lands descended or devised, when they are incapable of an equitable division among the heirs or devisees.—Code of 1876, § 2449. And jurisdiction is also conferred on the court to order the sale of lands, or of personal property, held by joint owners, or by tenants in common.—Code of 1876, § 3497 *et seq.* A sale of property, real or personal, held jointly or in common, which is incapable of a fair partition, under a decree of a court of competent jurisdiction, is a favored policy of the legislation of the State.

Before the jurisdiction of the court of probate to settle an administration, and to make division and distribution, has been put in exercise, without the assignment of any special cause, devisees or heirs, legatees or distributees may resort to a court of equity for a settlement of the administration, and for the payment of legacies, the distribution of personal assets, and for a division of lands devised or descended.—*McNeill v. McNeill*,

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36 Ala. 106. The court, proceeding according to its own practice, is governed by and applies the law controlling the settlement of administrations, the distribution of assets, or the partition or division of property, which prevails in the court of probate. The parties lose neither right nor remedy by resorting to a court of equity, instead of invoking the jurisdiction of the court of probate. If, to effect a final settlement, distribution and partition, a sale of lands is necessary, the court will order the sale in all cases in which, under like circumstances, the court of probate would have had jurisdiction to order it.— *Wilson v. Crook*, 17 Ala. 59; *Hall v. Wilson*, 14 Ala. 295.

The purposes of the present bill, filed by legatees and devisees, are a settlement of the administration, a distribution of the personal assets in accordance with the will of the testator, and a sale of the lands devised, to effect a division justly and equitably among the devisees. Upon its allegations, if the administration remained in the court of probate, it would be the duty of the personal representative to obtain an order for the sale of the lands devised, to effect a division among the devisees. The court of equity may and should decree the sale. It is necessary to secure to the devisees the full measure of right to which they are entitled.

The mortgagees of the undivided interest of several devisees executing the mortgages are necessary parties to the bill. They have an interest in the subject-matter of suit, and, in their absence, a clear, unembarrassed title to the lands could not be sold, and no other ought the court to decree sold and conveyed. The demurrer to the bill was properly overruled, and the decree of the chancellor is affirmed.

Vann v. Vann, Ex'rx et al.

Bill in Equity to Charge Lands Devised with Payment of Debt contracted by the Executor.

1. *Debt contracted by executor; when imposes only a personal liability.* Under the provisions of a will directing the testator's estate to be kept together and managed by the executor until the youngest child of the testator should attain the age of twenty-one years, and authorizing the executor to transact any business pertaining to the interests of the estate without the orders of any court, the executor has no authority to contract, on the credit of the estate, for the services of a party to take charge of, and superintend the cultivation of lands belonging to the estate; and such a contract, made in 1861, only imposed a personal liability on the executor.

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APPEAL from Russell Chancery Court.

Heard before Hon. JNO. A. FOSTER.

The bill in this cause was filed on 6th October, 1880, by Joseph Vann against the surviving executrix and the devisees of Joseph M. Vann, deceased, and the case made thereby is as follows: Joseph M. Vann departed this life in 1859, seized and possessed of a large and valuable estate, consisting in part of a plantation and slaves and other personal property, and leaving a last will and testament, in which the testator nominated Henry M. Vann, his brother, and Elizabeth Vann, his wife, as his executor and executrix, and directed that his estate should be kept together and managed by his said brother and wife, until his youngest child should arrive at the age of twenty-one years; and authorizing them to buy and sell property for the benefit of his estate, and to transact any business pertaining to the interests of the estate without any order of court; and providing further that they should not be compelled to make any return to any court of their actings and doings, the testator expressing, as a reason therefor, "full faith and confidence in their prudence and integrity." After bequeathing certain specific legacies to his wife and children, the testator directs, that when his youngest child should attain the age of twenty-one years, all his land negroes and other personal property remaining on hand should be sold and equally divided among his children. The will was duly probated, and Henry M. and Elizabeth Vann were appointed the executor and executrix thereof, on 12th April, 1860, without bond. They acted jointly as such executor and executrix until 19th February, 1875, when Henry M. Vann died. Since that time the said Elizabeth has continued to act as executrix of said will. In and during the year 1861, the complainant, under a contract with said executor and executrix, took charge of, and superintended the cultivation of certain lands belonging to the testator's estate, for which they agreed to pay him \$250, which is averred to have been the reasonable value of his services. Of this sum no part was paid until in 1865, when the said Elizabeth Vann paid complainant \$10; and in December, 1865, the said Henry M. and Elizabeth Vann, as such executor and executrix, gave to complainant their note for \$240, "the amount then agreed on to be due for said services." This note not being paid, it was, on 1st December, 1872, renewed; and on the renewed note the complainant obtained judgment in the Circuit Court of Russell county, on 12th November, 1874, against the said Henry M. and Elizabeth Vann, as such executor and executrix, for the sum of \$427.79, the amount then due thereon, which judgment was never paid or satisfied. The bill further avers that the estate of Henry M. Vann is insolvent, that the said Elizabeth Vann is also insolv-

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ent, and that there are no personal assets belonging to said estate, out of which his claim can be paid. The prayer of the bill is to have a certain tract of land (or so much thereof as may be necessary), of which the testator died seized and possessed, sold for the payment of his claim. By an amendment to the bill it was averred that the executor and executrix had the power under the will to contract for said services and to charge the said estate with the value thereof, and that they would have been entitled to a credit therefor, if they had paid the claim; and that in equity complainant ought to be paid out of said estate. By the amendment it is also prayed, that the complainant "be subrogated to the rights in equity, that said executor and executrix would have had, had they paid for said services, by decreeing that orator be paid the value thereof out of the property belonging to said estate." The defendants demurred to the bill as amended, the gist of the demurrer being that the will conferred no power on the executor and executrix to contract said debt, that it merely imposed a personal liability on them, and that the claim was stale and barred by the lapse of time.

The Chancery Court entered a decree sustaining the demurrer and dismissing the bill; and that decree is here assigned as error.

J. T. NORMAN, for appellant, cited 2 Perry on Trusts, §§ 907-13; 19 Ala. 672; 30 Ala. 430.

L. W. MARTIN, *contra*. (No brief came to the hands of the reporter.)

STONE, J.—The decree of the chancellor rendered in this cause must be affirmed on two grounds. The debt, for the payment of which the bill seeks to have the lands of the testator sold, was contracted by the executors in 1861, and, at that time, imposed only a personal liability on them. For aught that appears in the bill, the executors may have been largely in default to the estate, and the will gives them no power to contract debts on the credit of the estate. And, as a debt against the lands devised, the claim had long been barred by the limitation of six years, when the present bill was filed.—*Steele v. Steele*, 64 Ala. 438; *Vanderveer v. Ware*, 65 Ala. 606; *Maybury v. Grady*, 67 Ala. 147.

Affirmed.

[Steed v. Barnhill.]

Steed v. Barnhill.*Action on Promissory Note.*

1. *Recovery on joint and several contracts.*—Under the statute (Code of 1876, §§ 2905, 2919), written obligations and promises of any description are several as well as joint; and in a suit against the obligors or promissors a recovery may be had against one or more of them, as the facts in evidence may justify.

2. *Verdict; what sufficient.*—A verdict in favor of the plaintiff against “the defendant” in a suit where three persons are joined as defendants, is sufficient and will support a judgment against all the defendants. In such case the reasonable intendment is, that the word *defendant* was used for *defendants*, and it will be treated as a mere clerical mispision.

APPEAL from Clay Circuit Court.

Tried before Hon. LEROY F. BOX.

This was a suit brought by J. L. Barnhill against R. F. Steed, W. A. Steed and W. D. Steed, and was founded on a promissory note, executed by the defendants to the plaintiff. The defendants pleaded the general issue, and a failure of consideration. Other special pleas were also filed by the defendant W. D. Steed, which need not be set out in this report. As recited by the bill of exceptions, “the evidence introduced by the defendants tended to show that the note sued on was without any consideration on the part of the defendants R. F. Steed, and W. A. Steed, the former the wife, and the latter the son of the defendant W. D. Steed, and that the said W. A. Steed and R. F. Steed executed said note without any consideration and for the pre-existing debt of W. D. Steed, who signed said note after its execution by the other defendants;” and also “a want of any consideration in said note as against the defendant W. D. Steed.” The bill of exceptions further states that the “plaintiff introduced evidence showing that at the time of the execution of the note sued on by R. F. Steed and W. A. Steed the plaintiff delivered to R. F. Steed an old note held by plaintiff on the defendant W. D. Steed, the balance due on said old note having been included in the note sued on, and that some time after this plaintiff procured the signature of the defendant W. D. Steed. This was all the evidence tending to show any consideration in the note sued on against defendants R. F. Steed and W. A. Steed. The above is a recital of all the evidence necessary for a correct understanding of the questions of law reserved.” The court refused to charge the jury, at the written request of the defendants, that “the plaintiff must recover against all the defendants or he can recover against none of them,” and charged the jury that “the note sued on was the joint and sev-

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eral obligation of the defendants, and that the plaintiff might recover against all of them, or against any one of them." To the charge given and to the refusal of the court to charge as requested the defendants separately excepted. The jury returned a verdict against "*the defendant*;" and thereupon the defendants moved to arrest the judgment of the court on the ground that "the verdict of the jury finds the issue against a single defendant, and does not show which defendant the issue is found against." The court overruled the motion in arrest of judgment, and the defendants excepted.

The rulings of the Circuit Court, above noted are here assigned as error.

SMITH & SMITH, for appellants.—(1) "Where the plaintiff declares on a joint and several promissory note against all the makers jointly, a recovery must be had against all the defendants or none."—1 Chitty on Plead. (16 Am. Ed.), p. 52. (2) The charge given was erroneous because it authorized a recovery against a married woman. Coverture may be given in evidence under the general issue.—2 Greenl. on Ev. § 135, and authorities cited. (3) The verdict was a finding against a single defendant without showing the particular defendant against whom the issues were found. It was, therefore, too uncertain and indefinite to support a judgment.

PARSONS & PEARCE, *contra*.—(1) The court did not err in refusing to give the charge requested by the defendants, or in the charge given.—Code of 1876, §§ 2905, 2919. (2) The motion in arrest of judgment was properly overruled.—*Porter v. Cotney*, 3 Ala. 314; *Meeker v. Childress*, Minor, 109.

SOMERVILLE, J.—The usual rule is, that a judgment rendered against several persons who are *jointly* liable, is an entirety, and if it is void as to one defendant, it is void as to all. The statute, however, makes all written obligations and promises, of any description, *several* as well as joint, and authorizes a recovery against one or more, as the facts may justify. Code of 1876, §§ 2905, 2919; Freeman on Judgments, § 136.

The rulings of the court so declared the law, and were correct.

The motion in arrest of judgment was properly overruled. The reasonable intendment is that the word *defendant* in the verdict of the jury was used for *defendants*—a mere clerical misprision, which will not prevent the judgment from being supported by the verdict.—*Porter v. Cotney*, 3 Ala. 314; *Meeker Childress*, Minor, 109.

Affirmed.

Whaley v. Whaley.

Bill in Equity to enforce Resulting Trust in Land.

1. *Right of trustee to pursue trust funds invested in other property; character of the trust.*—Where a *cestui que trust* seeks to pursue trust funds invested by the trustee in land or other property, and title taken in his own name, or in the name of a stranger with notice, it is wholly immaterial whether the money was paid at the time of the purchase or afterwards. This is not technically or strictly a resulting trust, but a trust created by law, originating in the right of the *cestui que trust* to pursue the trust fund, through its various transmutations, into a new investment made in violation of the trustee's duties.

2. *Resulting trust; money must be paid at time of purchase.*—Where no question arises as to misappropriation of trust funds, but money or property without fiduciary ear-marks is paid or invested by one person, and the title is taken in the name of another, the money must be paid or the property re-invested at the time of the purchase, in order to create a resulting trust.

3. *Same; does not exist where the money was loaned.*—If one person advances the purchase-money of property by way of a loan to the vendee, and conveyance of title is made to the latter, no trust will result in favor of the party advancing the money. In such case the very fact of a loan contradicts and rebuts the implication of a trust, which might otherwise be presumptively raised by law.

4. *Same; can not be created by parol agreement.*—Where such a trust does not result from the transaction itself, by implication of law, it can not be created by express agreement between the parties, resting merely in parol, as such an agreement would violate the statute of frauds.

APPEAL from Pike Chancery Court.

Heard before Hon JNO: A. FOSTER.

The bill in this cause was filed on 25th September, 1879, by James M. Whaley and Elizabeth P. Massey against Isaac R. Whaley and others, for the purpose of establishing a resulting trust in certain lands in the bill described. The facts from which, it is claimed, the trust results are stated in the bill to be substantially as follows: In 1858, Isaac Whaley departed this life intestate, seized and possessed of an estate consisting, in part, of the lands described in the bill. These lands were sold under the order of the Probate Court of Pike county by the administrators in chief, the widow, Ruth Whaley, consenting that her dower interest might be sold under the statute. The purpose for which the lands were sold is not stated in the bill, but it is averred that the estate was solvent. At the sale Ruth Whaley purchased said lands and "other property, for which she executed her note for the sum of twenty-two hundred and fifty 31-100 dollars, supposing that her distributive share in said es-

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tate would be equal to, or more than said amount," but owing to bad management and the results of the war, she was in this disappointed. The administrators in chief "resigned or were removed," and an administrator *de bonis non* having been appointed, he threatened to commence proceedings to have the lands subjected to the payment of said note. In order to secure the lands to the said widow, an agreement was made and entered into, during the year 1866, by and between the complainants and the said administrator, Ruth Whaley and all the heirs of Isaac Whaley, deceased, who were then of age, that said estate "was due complainant, Elizabeth Massey, as one of the heirs of Isaac Whaley, deceased, about the sum of five hundred dollars, and also due J. M. Whaley, the other complainant, about the sum of three hundred and fifty dollars; that said two amounts should go in payment and extinguishment of said Ruth Whaley's note; and Ruth Whaley then and there promised and agreed, in consideration of said sums, that, in the event she should not be able to pay complainants their sums of money back, they were to be re-imbursed out of the lands and any other property she might have and own at her death." In pursuance of this agreement "the said Ruth Whaley executed to complainants her promissory notes for the amounts of the advancements made by them respectively;" and afterwards the administrator reported the payment of the purchase-money for the lands, and under an order of court conveyed the same to the said Ruth Whaley. Copies of the notes made to complainants, are made exhibits to the bill. In the note to James M. Whaley the consideration is stated to be money paid by him to the administrator on the note for the purchase-money for said lands; but no consideration is expressed in the other note. All the heirs and distributees were fully paid their distributive shares in said estate, except the complainants. Ruth Whaley died in February, 1877. The complainants and the defendants are the only heirs at law of said decedent.

The defendants answered the bill, insisting that there was no resulting trust as claimed by the complainants, and that the agreement between them and Mrs. Whaley rested in parol, and was void under the statute of frauds.

The cause was first heard at the spring term, 1880, of said court, before Hon. H. Austill, on pleadings and proof, and a decree was then entered dismissing the bill; but, at the same term, an application was made by the complainants for a rehearing, which was afterwards granted in vacation, the order granting the rehearing reciting that it was held up for decree in vacation. At the spring term, 1881, the cause was again submitted on the pleadings and proof, and also "on the power of the Chancery Court to grant a rehearing" in the cause, and was heard

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before the Hon. Jno. A. Foster. On this hearing the chancellor was of the opinion, that no action was taken on the application for a rehearing during the term at which it was made, and that the subsequent granting of the rehearing in vacation was without authority of law and void. He, therefore, caused a decree to be entered, setting aside the submission, and striking the cause from the docket, "the same," as stated in the decree, "having been dismissed out of court by a former decree, which is in full force and effect."

The decree rendered at the spring term, 1880, dismissing the cause, and the decree rendered at the spring term, 1881, striking the cause from the docket are here assigned as error.

W. D. WOOD, for appellants.

PARKS & HUBBARD, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—It would seem clear, beyond doubt, on well settled principles, that the appellants, Whaley and Massey, had no resulting trust or equity in the land described in the bill as having been conveyed to Mrs. Whaley, the mother of appellants.

The rule is properly stated in *Preston v. McMillan*, 58 Ala. 84, that when a *trustee* invests *trust funds or effects*, held by him in a fiduciary capacity, in land or other property, and takes the title in his own name, or in the name of a stranger with notice of the trust, so long as such funds can be identified by being traced into specific property, the *cestui que trust* can claim the entire property, if paid for exclusively with his money, or he can assert an equity to re-imbursement *pro tanto* for his moneys so misapplied by the trustee. In cases of this nature, it is wholly immaterial as to whether *the money was paid at the time of the purchase or afterwards*. Though often classified in the books as a resulting trust, such a designation is not technically or strictly accurate. It is a trust implied or created by law, originating in the right to pursue a trust fund, through its various transmutations, into a new investment made in violation of the duties of the trustee. 1 Perry on Trusts, §§ 127-8; 2 *Ib.* §§ 836-7; *Thames v. Herbert*, 61 Ala. 340; 1 Lead. Eq. Cases, 277-8; *Preston v. McMillan*, *supra*.

In the case, however, of an ordinary or technical resulting trust, where no question arises as to a misappropriation of trust funds, or their pursuit into new investments, but money or property without fiduciary ear-marks is paid or invested by one person and the title is taken in the name of another, the money

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must be paid or the property re-invested *at the time of the purchase*, otherwise no resulting trust proper is created. This principle is announced in *Coles v. Allen*, 64 Ala. 98, *Lehman v. Lewis*, 62 Ala. 129, and other cases, but must be limited as applicable only to strict resulting trusts, and does not apply to investments of trust funds made by a trustee in violation of fiduciary duty.—2 Perry on Trusts, § 828, note 8, and cases cited.

It is, furthermore, indisputable law, that if one person advance the purchase-money of property, by way of a *loan*, to the vendee, and conveyance of title is made to the latter, no trust will result in favor of the one who thus advances the money. The very fact of a *loan* contradicts and rebuts the implication of a trust which might otherwise be presumptively raised by law. 1 Perry on Trusts, § 133; *Six v. Shaner*, 26 Md. 415; *Lehman v. Lewis*, 62 Ala. 129; *Gibson v. Foote*, 40 Miss. 788; *Chapman v. Abrahams*, 61 Ala. 108.

The application of these principles is clearly fatal to the equity of complainants' bill. The money, or claim, as the case may be considered, advanced by appellants to Mrs. Whaley during her life-time, and used by her in part payment for the land purchased from her husband's estate, was a mere loan and nothing more. The promissory notes, given for it and bearing interest, are conclusive on this point, and are utterly inconsistent with the theory of a resulting trust in favor of the lenders of the money. The recital in the notes as to the purpose for which the money was to be used in no wise changed this aspect of the transaction.

The money was advanced, too, long after the purchase of the land, and after the debt for the purchase-money had been created by Mrs. Whaley, the vendee.

In view of these facts, it was not permissible to receive parol evidence for the purpose of proving an express agreement to charge the lands with the money advanced. Parol proof is not admissible for such a purpose. Where a trust does not arise from the transaction itself so as to result by mere implication, it can not be created by the express agreement of the parties, for such agreement must be in writing and can not rest in parol; otherwise it would be in the very teeth of the statute of frauds. Code, 1876, § 2199; *Patton v. Beecher*, 62 Ala. 579; 1 Perry on Trusts, § 135.

It is unnecessary to consider the soundness of the reason assigned by the chancellor for the dismissal of the bill. It was clearly without any equity, and we prefer to rest our judgment on this less questionable ground.

Affirmed.

[Clark, Adm'r, v. Hughes.]

Clark, Adm'r, v. Hughes.*Bill in Equity for Final Settlement and Distribution of Estate of Decedent.*

1. *When administrator chargeable with damages resulting from unreasonable delay in making settlement.*—When an administrator, without sufficient excuse, delays final settlement and distribution for an unreasonable time, he is chargeable with damages resulting therefrom to legatees or distributees, although he may have safely kept the money of the estate unproductive and unemployed, and although he may make the statutory, exculpatory oath.

2. *Same; measure of damages.*—In such case, the statutory rate of interest is the measure of damages.

3. *Same; from what date interest should be calculated.*—When the statutory oath is taken by an administrator, and it is not successfully controverted, interest should not be computed from the day the assets are reduced to money and thus made ready for distribution, but a reasonable time should be allowed him to make preparation for, and consummate a settlement of his administration, including time for an arrangement of materials, and for conference with counsel, preliminary to filing his account, or bill in chancery, as the questions to be decided may require, and also for conducting the proceedings to final decree.

4. *Same; what constitutes reasonable time.*—What should be considered a reasonable time in such case, would be the time consumed by an ordinarily prudent man in commencing and carrying through a litigation of similar character, which he had previously determined to institute, and must depend, in a large measure, on the facts of each particular case, varying with the complication of facts or legal principles involved, and the tribunal in which the settlement is made.

5. *Same; sale of lands for division; when not prejudicial to administrator on question of interest.*—The statute expressly authorizing a sale of lands for division, when they "can not be equitably divided amongst the heirs or devisees," and requiring that the application therefor must be made by the administrator or executor, the fact that an administrator sold lands for division, thereby causing delay in the settlement of the estate, can not exert a prejudicial influence against him in the matter of charging him with interest as damages, in the absence of proof that the sale was not necessary to effect an equitable division, or that he acted in bad faith.

6. *Interest against administrator as damages for delay in making final settlement; from what date to be computed.*—On the settlement of the accounts of an administrator of the estates of two decedents, one of whom was an heir of the other, in a court of equity, on a bill filed by the distributees of the deceased heir against the administrator, and against the distributees of the ancestor, who were non-residents of the State,—held, that eighteen months after the estates became ready for final settlement and distribution was a reasonable time for instituting a suit for that purpose, and for carrying such suit to a final determination; and that after the expiration of the eighteen months, the administrator was chargeable with interest as damages resulting from the delay, although he had made the statutory affidavit, and it was not controverted.

[Clark, Adm'r, v. Hughes.]

APPEAL from Greene Chancery Court.

Heard before Hon. A. W. DILLARD.

Prior to the year 1871, Mrs. Isabella Cawfield departed this life, intestate, seized and possessed of real and personal property, and leaving, as her only heirs at law, Thomas G. Cawfield and two other children; and after her death Thomas G. Cawfield also died, owning an estate, the principal portion of which consisted of his distributive share in the estate of his mother, Mrs. Isabella Cawfield, and leaving him surviving his widow, Eliza J., who afterwards intermarried with William Hughes, and, as his only heirs, his two children, Henry and Isabella Cawfield. On the 10th of April, 1871, Thomas C. Clark was appointed administrator of the estate of Thomas G. Cawfield, and on the 19th of May, 1871, he was also appointed administrator of the estate of Mrs. Isabella Cawfield, both appointments having been made by the Probate Court of Greene county, by virtue of his office of general administrator of said county. The bill in this cause was filed on the 22d July, 1878, by Eliza J. Hughes and her said husband, and Henry and Isabella Cawfield, against Thomas C. Clark, as administrator of the estate of Mrs. Isabella Cawfield, and also as administrator of the estate of Thomas G. Cawfield, and against the surviving heirs of Mrs. Cawfield, for a settlement of both estates. On a submission of the cause, on bill and answer, a decree was rendered, taking jurisdiction of said estates, and directing the administrator to file his accounts and vouchers for a final settlement.

The administrator having filed his accounts and vouchers, settlements of both estates were had before the register on the 21st of May, 1879. No interest was charged in either account, but the administrator made and filed with the register an affidavit that he had not used the funds of said estates for his own benefit, and that he had not made any profit thereon. The affidavit was not controverted. In his account as administrator of the estate of Isabella Cawfield, the debits commence on the 19th of August, 1871, and run to 1st March, 1874, the principal items, however, bearing date January 8th, 1874, and March 1st, 1874, being for the purchase-money of lands sold by him for partition or distribution. These lands appear to have been sold in November, 1873. The debits in his account with the other estate commence on 22d May, 1871, and run to March 8th, 1873. In this account he is also charged, as of date of the settlement, with the distributive share of Thomas G. Cawfield in his mother's estate, as ascertained on the settlement of that estate. On both settlements motions were made to charge the administrator with interest, on the ground that he had delayed making settlements for an unreasonable length of time. On

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his behalf testimony was introduced tending to show, as a reason for the delay, that the surviving heirs of Mrs. Cawfield, who were non-residents of the State, had notified him that they claimed the interest of their deceased brother, Thomas G. Cawfield, in their mother's estate; that he had requested them to file a bill to establish their claim, and that they had promised him, through their attorney, that they would do so. These motions were overruled by the register, to which exceptions were duly reserved. Exceptions were also filed to reports of the settlements made by him. On a submission of the cause on the reports of the register and the exceptions thereto, decrees were entered sustaining the exceptions, referring the accounts back to the register to be re-stated, and directing him to charge the administrator, in his account with the estate of Isabella Cawfield, with interest "from July, 1873, until the present time on all funds collected previously thereto, and from July, 1874, on the proceeds of the land sale;" and in his account with the estate of Thomas G. Cawfield, with interest "from July, 1874, on whatever balance was then in his hands, after deducting debts and charges paid by him, together with the commissions then due him." The register was also directed to allow the administrator interest on disbursements. The register re-stated the account of the defendant Clark, as administrator of the estate of Isabella Cawfield, in accordance with the directions of the chancellor, and reported the account, as corrected, to the court; and thereupon the report was confirmed, and a final decree of distribution entered. It does not appear from the record that any further proceedings were had in the matter of the settlement of the estate of Thomas G. Cawfield, after the administrator's account went back to the register. It was also shown, on the settlement of the estate of Isabella Cawfield, that the administrator had made partial payments on the distributive shares of two of the distributees, for which he was allowed proper credits.

On appeal by the administrator, the rulings of the chancellor above noted are assigned as error.

WATTS & SONS, and CLARK & McQUEEN, for appellant.—(1) The administrator made the affidavit which the statute declares shall exonerate him from any charge of interest, and it was not controverted. He was, therefore, not chargeable with interest. *McCreeliss v. Hinkle*, 17 Ala. 459; Code of 1876, § 2520. The case of *Farmer v. Farmer*, 26 Ala. 671, recognizes the principle settled in *McCreeliss v. Hinkle*, *supra*; and it has not been modified by the later cases of *Pearson v. Darrington* (32 Ala. 227), *Harrison v. Harrison* (39 Ala. 489), or *Ivey v. Cole-*

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man (42 Ala. 409). (2) Those cases commented on, and distinguished from this case.

SNEDECOR, COCKRELL & HEAD, and WM. P. WEBB, *contra*. (1) Independent of statutory regulation, it is well settled that administrators are allowed reasonable time in which to settle without liability for interest, unless interest has been made or the funds used; and, on the other hand, that they are liable for interest, whether actually made, or the funds used, or not, after the expiration of such reasonable time. The following authorities are in point: *Harrison v. Harrison*, 39 Ala. 511; *Hough v. Harvey*, 71 Ill. 72; *Gwynn v. Dorsey*, 4 Gill & J. (Md.) 453; *Chase v. Lockerman*, 11 Ib. 185; *Paine v. Paulk*, 39 Me. 15; *Stearns v. Brown*, 1 Pick. 530; *Duncomb v. Duncomb*, 1 John. Ch. 508; *Manning v. Manning*, 1 Ib. 527; *Williamson v. Williamson*, 6 Paige, 298; *Garniss v. Gardiner*, 1 Ed. Ch. (N. Y.) 128; *Ogilvie v. Ogilvie*, 1 Bradf. (N. Y.) 356; *Cooch v. Irvin*, 7 Ohio St. 22; *Light's Appeal*, 24 Pa. St. 180; *Biles' Appeal*, Ib. 335; *Burner's Appeal*, 57 Ib. 46; *Darrel v. Eden*, 3 Desau. (S. C.) 241; *Jenkins v. Fickling*, 4 Ib. 369; *Benson v. Bruce*, Ib. 463; *Lenoir v. Winn*, Ib. 65; *Brown v. Vinyard*, 1 Bailey (S. C.) Ch. 460; *McAlister v. Brice*, 1 McMull. (S. C.) Ch. 275; *Boynton v. Dyer*, 18 Pick. 1, 7; *Wyman v. Hubbard*, 13 Mass. 232; *Lamb v. Lamb*, 11 Pick. 371; *Forward v. Forward*, 6 Allen (Mass.), 494; *Wendell v. French*, 19 N. H. 205; *Lund v. Lund*, 41 N. H. 355; *Hallett v. Hare*, 5 Paige, 315; *Hasler v. Hasler*, 1 Bradf. 248; *Perry on Trusts*, § 468. (2) This rule has not been changed by statute. Section 2520 of the Code of 1876, relied on by the administrator, was designed for the protection of distributees. Without it the administrator, on a settlement made at the expiration of eighteen months, could remain silent, and escape the payment of interest, unless the distributees made proof to charge him. To remedy this, and to provide a mode of *purging the conscience* of the administrator before casting the burden of proof on the distributees, section 2520 was adopted. But this section has no application where the administrator retains the funds for an unreasonable length of time after he could and ought to have settled. Sections 2339 to 2669 of the Code form a general system of laws, enacted *for the speedy settlement* of estates, and are to be construed *in pari materia*. *Fretwell v. McLemore*, 52 Ala. 124. Construing section 2520 in connection with section 2528, authorizing (and hence requiring) a settlement as soon after the expiration of eighteen months as the condition of the estate will allow, and measuring it by the general object and design of the whole system of law touching administration of estates, it is clear that the settlements to which

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section 2520 was intended to apply, were only such as were made pursuant to that system, to-wit: *speedy settlements*. (3) But this question is, we think, effectually settled by authority. See *Mims v. Mims*, 39 Ala. 716; *Pearson v. Darrington*, 32 Ala. 227; *Harrison v. Harrison*, 39 Ala. 511. In the case of *McCreeliss v. Hinkle*, 17 Ala. 459, the question here discussed was not raised or adverted to, and hence, there was no decision of it.

STONE, J.—The rulings in the case of *Clark v. Knox*, 70 Ala. 607, settle the principle that when an administrator, without sufficient cause, delays final settlement and distribution for an unreasonable time, he thereby incurs a liability to the legatees or distributees, for the damage he, in that way, inflicts on them, although he may, all the while, have safely kept the money unproductive and unemployed, and although he may make the statutory, exculpatory oath. The reason on which this ruling rests is, that it is the duty of the administrator to make settlement and distribute the assets, as binding on him as any other duty the statute casts upon him. It is his duty to become the actor in such proceeding. It is no excuse for him that the distributees might have moved against him, and thus coerced a settlement. Such motion, in its very nature, implies dereliction on the part of the administrator. A claim by a debtor that he shall not be charged interest on his debt past due, because he had all the while held the money, but the creditor had not sued for it, would present a seemingly parallel case. The damages such administrator is adjudged to pay, is not interest *as interest*. We adopt the statutory rate of interest, as the best, if not the only practicable measure of damages the nature of the question admits of. That is the rate for withholding money due, and this is but the withholding of money due.

But interest should not be computed from the day the assets are reduced to money, and thus made ready for distribution. When, as in this case, the statutory oath is taken, and it is not controverted successfully, a reasonable time should be allowed the administrator to make preparation for, and consummate a settlement. What is a reasonable time must depend, in large measure, on the facts of each particular case. Some settlements are much more complicated than others, in the facts or legal principles involved; and due regard should be had to these, in determining what is a reasonable time, in any given case. Some settlements can be made only in the chancery court, by reason of conflicting relations of the administrator, or other necessity for the exercise of chancery powers.—*Tankersly v. Pettis*, 61

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Ala. 354, and authorities cited. There must be reasonable time allowed for arrangement of materials, and for conference with counsel, preliminary to filing the account current for settlement, or bill in chancery, as the questions to be decided may require. Then a reasonable time must be allowed for conducting the proceeding to final decree. What should be considered a reasonable time, would be the time consumed by an ordinarily prudent man, in commencing and carrying through a litigation of similar character, he had previously determined to institute. The particular court, whether probate or chancery, becomes a factor in this inquiry. The latter court has much longer vacations than the former, and, in general routine, a settlement in chancery requires more time for its completion than would be required in the probate court.

The chancellor, in his decree, alludes to the fact that the lands of Mrs. Cawfield's estate were sold, not for the payment of debts, but for partition or distribution. He says the administrator might have made his settlement earlier, if he had not proceeded to sell the lands, and thus allowed them to devolve undivided upon the heirs. The statute expressly authorizes the sale of lands for division, when they "can not be equitably divided amongst the heirs or devisees." And the executor or administrator must make the application.—Code of 1876, §§ 2449, 2450. The bill complains of no irregularity in the proceedings which resulted in the sale. The order of sale could not have been obtained, without satisfactory proof that the lands could not be equitably *divided* between the heirs. In the sale of the lands, the administrator did only what the statute authorized him to do, and in the absence even of averment, that a sale was not necessary to effect an equitable division, we must presume good faith in this act of administration, and hold that it shall exert no influence prejudicial to the administrator, in the matter of damages or interest with which he is charged.

The record shows that the last installment of the land-purchase was paid before March 1st, 1874, but we are not informed how long before. Till that payment was made, the estate was not in condition to be settled. We take that as the date from which it became the duty of the administrator to take steps looking to a settlement. The settlement in this case could only be made in the chancery court.—*Hays v. Cockrell*, 41 Ala. 75. The defendants necessary to be made to a bill by the administrator were non-residents, and it would require longer time to perfect service on them. Making reasonable allowance for the accidental delays of litigation, we think eighteen months a sufficient time for instituting and carrying such suit, in this case, to a final determination. Making the affidavit he did, and that

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not controverted, the charge of interest against the administrator should have commenced, September 1, 1875.

Reversed and remanded.

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Final Settlement of Decedent's Estate in Probate Court.

1. *Hemphill v. Moody*, 62 Ala. 510, *re-affirmed*.—The decision of this court on former appeal, as to the construction of the testator's will in this case, is re-affirmed.

2. *When administrator chargeable with interest*.—The payment by an administrator, with the will annexed, of a legacy which was barred by the lapse of time, is a misappropriation by him of the funds belonging to the estate; and he is chargeable with interest thereon from the date of the misappropriation.

3. *When administrator not entitled to credit for taxes*.—The administrator, in such case, is not entitled to a credit for State and county taxes assessed against the funds thus misappropriated, and paid by him.

4. *When administrator entitled to a credit for costs of appeal in this court*.—Where an administrator, with the will annexed, on final settlement in the probate court, was allowed credit for a legacy which he paid, but on appeal this court held that the legacy was barred by the lapse of time, and that, therefore, the credit was improperly allowed, he is entitled to credit for the costs of the appeal paid by him, on settlement had after the cause had been remanded, he having acted in good faith in making the payment, and in the consequent litigation, and there being reasonable ground for controversy.

5. *When administrator not entitled to costs of suit instituted by him*. But where the administrator, after the decision of this court on the appeal, filed a bill in the chancery court, to enjoin the distributees from contesting further his claim to a credit for the amount paid by him on such legacy, and, on appeal to this court in that case, his bill was dismissed, he is not entitled, on final settlement, to a credit for the costs in the chancery court, or the costs of the appeal.

6. *Administrator entitled to credit for attorney's fee on final settlement*. An administrator is entitled to a credit for a reasonable fee paid his counsel for services rendered him on final settlement.

7. *When administrator not entitled to credit for taxes paid on land*.—An administrator is not entitled to a credit, on final settlement, for taxes paid by him on lands belonging to the estate, in the absence of evidence showing that the personal assets should be charged with the payment of such taxes, or that it was the duty of the administrator, in his representative capacity, to pay them.

APPEAL from Tuscaloosa Probate Court.

Tried before Hon. N. H. BROWNE.

In the matter of the final settlement of the accounts of Frank S. Moody, as administrator *de bonis non*, with the will annexed, of Edward Sims, deceased.

This cause was before this court at a former term, and is re-

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ported.—*Hemphill v. Moody, Adm'r*, 62 Ala. 510. On settlement had after the remandment of the cause, the administrator again claimed a credit of \$2000, which he had paid to the personal representative of one Aaron Ready, in satisfaction of a legacy left to Ready by the testator's will. The provisions of the will and the facts disclosed on the first settlement are stated in the report of the case on the former appeal, and need not be here repeated. On the settlement from which this appeal was taken, the administrator offered substantially the same evidence as was offered on the first settlement, and also additional evidence tending to show the character and quality of the lands devised to Mrs. Sims; that the income derived therefrom was insufficient to pay the expenses of the testator's family during his life, or of the widow's household after his death; that the testator was engaged, during his life, in mercantile and other pursuits, and that farming on said places was carried on by him on a small scale, as incident to his other avocations, and not for the purpose of making money; and that he owned but few negroes. The purpose of this evidence seems to have been to meet an argument employed in the opinion on the former appeal. The court, on objection made by Mary J. Hemphill, one of the appellees, refused to allow the offered evidence to be introduced, and refused to allow the said credit; and to these rulings he duly excepted. The Probate Court also refused to allow the administrator a credit for \$72.78, paid by him on certain State and county taxes, indicated in the opinion; and charged him with interest on the \$2000 paid by him to the personal representative of Aaron Ready, from 26th April, 1877, the day on which the first settlement was had, although he had filed an affidavit denying that he had used any of the funds of said estate for his own benefit; and to these rulings he separately excepted.

On the settlement the appellee, Mary J. Hemphill, also reserved a bill of exceptions. The Probate Court, against her objection, allowed the administrator a credit for costs of the former appeal in this case; also the costs in a suit in chancery instituted by the administrator, after the decision of this court on the former appeal, against the said Mary J. Hemphill and the other distributees of said estate, for the purpose of enjoining them from proceeding further to collect the \$2000 paid on the Ready legacy, or to have the same distributed; also the costs of the appeal to this court from the decree of the chancellor in that cause; also for fees paid his solicitors for the prosecution of said suit in both courts; also "for taxes paid by said Moody, as the administrator of said estate, on lands lying in Tuscaloosa county, Ala., for the years 1880 and 1881 respectively, which he claims to still hold as administrator of the es-

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tate of the said Edward Sims, and which, he claims, are yet unsold; and also for a fee paid his attorneys for services rendered on the last settlement in the Probate Court. To each of these rulings said appellee duly excepted. It was shown that the bill filed by the administrator in the Chancery Court was, on appeal to this court, dismissed. The reasonableness of the attorney's fees allowed him as a credit was not controverted. The record fails to show any grounds for charging the taxes on the lands against the personal assets, or any acts of administration in reference to said lands.

The Probate Court, *inter alia*, decreed distribution directly to the next of kin of Priscilla Bibb, deceased, who was a distributee of said testator. This appeal was sued out by the administrator; and the rulings of the Probate Court, above noted, to which he reserved exceptions, and also the decree in favor of the next of kin of the said Priscilla Bibb, he here assigns as error. The appellee, Mary J. Hemphill, under the rule, also assigns errors, the assignments of error by her embracing the adverse rulings of the Probate Court to which she excepted, as above noted.

J. M. MARTIN, for appellant.

A. C. HARGROVE, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—When this cause was heretofore before us, we decided that the legacy to Aaron Ready was due and payable at the expiration of eighteen months from the probate of the will of Edward Sims; and that more than twenty years having elapsed thereafter, all lawful claim to it was barred, when it was paid by the appellant. From that decision we are not inclined to depart; nor are we of opinion, the evidence proposed to be introduced on the last hearing before the Court of Probate, if admissible, could vary it.—*Hemphill v. Moody*, 62 Ala. 510.

An administrator, not unreasonably delaying settlement and distribution, and denying on oath the use of the funds of the estate, is not chargeable with interest. But if he has used the funds, whether for his own profit or purposes or not—if he has misappropriated or misapplied them, he is chargeable with interest from the time of the misappropriation. The payment of the legacy to Aaron Ready, after it was barred by the lapse of time, was a misappropriation of the funds of the estate. They were no longer in the custody and under the dominion of the administrator, and taxes upon them could not have accrued

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with which he was chargeable, or which he could be compelled to pay. We are of the opinion, the Court of Probate did not err in charging the appellant with interest on the money paid to the personal representative of Aaron Ready, and in rejecting the credit claimed for taxes thereon.

The general rule is, that an administrator entering into an unsuccessful contest with legatees or distributees, must pay costs; and is without a right or equity to re-imbursement from the assets in his hands to be administered.—*Jones v. Deyer*, 16 Ala. 221; *Henderson v. Renfro*, 31 Ala. 101. The statute regulating the settlement of administrations in the court of probate charges the executor or administrator with the costs of the contest of any item of his account, if the item is disallowed or reduced.—Code of 1876, § 2521. The credit for the payment of the legacy to Aaron Ready was allowed the administrator on the final settlement had in the Court of Probate. The decree of the court was reversed on appeal to this court, and the credit was disallowed. The good faith of the administrator in making the payment, and in the consequent litigation, can not be doubted. There was reasonable ground of controversy; and it would be a rigid and harsh construction of the statute, which would force him into the payment of the costs of the appeal, a new and independent suit against him by the dissatisfied distributees. The costs of the appeal paid by him the Court of Probate properly allowed as a credit..

Upon the principles laid down in *Pickens v. Pickens*, 35 Ala. 442, and in *Smalley v. Reese*, 53 Ala. 89, the fee paid counsel, its reasonableness not being controverted, for services rendered on the last final settlement in the Court of Probate, was a proper charge against the estate. The costs of the suit in chancery, and the costs on appeal from the decree rendered in that suit, ought not to have been allowed.—*Bendall v. Bendall*, 24 Ala. 295; *Anderson v. Anderson*, 37 Ala. 683; *Teague v. Corbitt*, 57 Ala. 529.

There is no reason shown for charging the personal assets with taxes on the lands of the testator; and in the absence of some fact showing that the personal assets should be charged, and some fact shown rendering it the duty of the administrator, in his representative capacity, to pay them, the credits for these taxes should be disallowed. If the lands were devised, the estate in them had vested in the devisees, or if not devised, the estate had vested in the heirs, who were chargeable with the taxes upon them. If it had appeared the administrator had exercised the powers the statute gives him, for the sale or renting of lands, the necessities of the administration requiring an exercise of the power, and from them rents could not be obtained, a different question would be presented. But upon the

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facts now shown, there was no liability resting upon the administrator for the taxes; the liability rested on the devisees or the heirs.

The court also erred in decreeing distribution directly to the heirs or next of kin of Priscilla Bibb, deceased. On the death of a distributee, or of a legatee, the personal representative of such distributee or legatee must be before the court of probate on the final settlement of the administration.—1 Brick. Dig. 972, §§ 826-27.

For the errors we have pointed out, the decree of the Court of Probate must be reversed and the cause remanded. The costs of the appeal must be paid, one half by the appellant Moody, to be re-imbursed to him from the assets in his hands for administration, and one half must be paid by the appellees.

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Contest between Attaching and Judgment Creditors over Fund in the hands of the Sheriff, realized from sale of Debtor's Property.

1. *Declarations of debtor in contest between creditor and purchaser; when inadmissible.*—It is a well settled principle of evidence, that, in a contest between an attaching or execution creditor and a purchaser from the debtor, who has paid value, without notice, actual or constructive, of a fraudulent intent on the part of the seller, the admissions and declarations of the debtor, made anterior to the sale under which title is asserted, are not admissible in evidence against the purchaser to show a fraudulent intent on the part of the debtor in making the sale.

2. *Declarations by debtor in contest between attaching and execution creditors; when admissible.*—But in a contest between an attaching creditor and a creditor who has obtained a judgment by confession, over a fund realized from a sale of merchandise, on which the attachment and an execution issued on the confessed judgment had been levied, acts and declarations of the debtor in relation to his property, the debt due the attaching creditor, and his plans and purposes in reference to its payment, done and made before the judgment was confessed, are admissible in evidence for the attaching creditor on an issue of fraud *vel non*, made up between the contesing parties, in the absence of all evidence tending to show when the claim of the judgment creditor accrued.

3. *Presumption on appeal in favor of ruling of lower court.*—On appeal this court will presume every thing in favor of the correct ruling of the primary court, which the record does not affirmatively show to be otherwise.

APPEAL from the City Court of Montgomery.
Tried before Hon. THOMAS M. ARRINGTON.

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This was a contest between Dunham, Buckley & Co. and the Phoenix Manufacturing Company, a corporation, attaching creditors of Baum & Kullman, the appellees, and Moses, Blum & Weil, and others, judgment creditors of Baum & Kullman, the appellants, over a fund in the hands of the sheriff of Montgomery county, which was realized from a sale of a stock of goods, wares and merchandise, on which he had levied the two attachments in favor of the appellees, and also executions issued on the several judgments in favor of the appellants. The statement of the case made by the record in the opinion only renders it necessary to set out the testimony introduced on the trial by the appellees.

The deposition of Charles E. Beach, a witness examined on behalf of the appellees, was read in evidence by them, the substance of which was as follows: On 29th October, 1880, the witness, who was the agent of the Eagle & Phoenix Manufacturing Company, met Mr. Baum at the store of Baum & Kullman, in the city of Montgomery, and told him he had heard that his firm were having some trouble financially, and asked him whether it was true, requesting at the same time a statement of their business. Baum's reply was, that they were having no trouble, were perfectly solvent, had paid all accounts and other claims that had fallen due up to that date, and expected in future to pay all claims as they became due; that although the account due the Eagle & Phoenix Company did not fall due until the following week, they would try to make a payment thereon during the day, if witness would call again. He further stated that at that time his firm had on hand a stock of goods worth about \$20,000; that they had about \$12,000 in notes and accounts on their books, and that about \$18,000 would cover their indebtedness, all of which they expected to meet as it became due. He expressed full confidence in the ability of his firm to carry on their business, and no reference whatever was made by him to an assignment; and he stated that he saw no reason for the report that that they were in trouble. On the same day the witness had a second conversation with Baum at the firm's store, in which he stated that it would be impossible for him to pay witness any money on that day, as he had expected to do, because he had \$4,000 due in New York during the early part of the following week, which he had to meet. He, however, assured witness that he would meet every bill when due, and that he need not have any uneasiness about the account, for they would pay it either before or at maturity. On 16th November, 1880, Baum & Kullman paid witness' company one account which it held against them, and on 19th November, 1880, the company's treasurer drew a draft on them for the amount of another account, which became due on 20th

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November, 1880, through a bank at Montgomery. On the last named date witness went to Montgomery to look after this draft. It was presented twice by the bank having it for collection on Monday, November 22d, 1880, within banking hours, but was not paid. On the evening of that day witness heard that Baum & Kullman had confessed judgments in favor of the appellants. The evidence of this witness further tended to show that Baum & Kullman were then insolvent. Objections were duly made by appellants to so much of this deposition as related to conversations had by the witness with Baum & Kullman; but their objections were overruled, and they excepted.

The appellees also examined as witnesses the cashier, collector and book-keeper of the bank having the draft for collection, by whom its presentation and non-payment were shown. The collector, who presented the draft a little after nine o'clock on the morning of 22d November, 1880, testified that when he did so, Baum & Kullman told him that "they would come up during the day and arrange the matter." The book-keeper testified "that on 22d November, 1880, he met Mr. Baum on the street about ten o'clock a. m., who volunteered and told him that he would be up at the bank and arrange the Eagle & Phoenix matter." To the testimony of each of these witnesses the appellants separately objected, but their objections were overruled, and they excepted.

The appellants asked the court in writing to charge the jury, that "when interrogatories are propounded to a witness, he has no right to answer any more than is called for in said interrogatories." This charge the court refused to give, and the appellants excepted.

The rulings above noted are here assigned as error.

SAYRE & GRAVES and E. A. GRAHAM, for appellants. (1) The declarations made by Baum were not competent. There was no proof of any design on the part of appellants to commit a fraud, or that they knew that there was any intention on the part of Baum & Kullman to commit a fraud. No predicate was proved, which could, under any circumstances, render such declarations competent.—*Abney v. Kingsland*, 10 Ala. 355; *Oden v. Rippetoe*, 4 Ala. 68; *Pipkin v. Pickett*, 64 Ala. 524; *Bradley v. Ragsdale*, 64 Ala. 558; *Mahone v. Williams*, 39 Ala. 214; *Chapin v. Pease*, 10 Conn. 69. (2) Baum was a competent witness, and for this reason his declarations were not competent.—*Bank v. McDade*, 4 Port. 270. (3) The declarations were not admissible without establishing facts, from which an inference may fairly be deduced, that there was a combination between the appellants and Baum & Kullman to defraud the creditors of the latter.—*Weaver v. Yeatmans*, 15 Ala. 539.

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CLOPTON, HERRERT & CHAMBERS, *contra*.—(1) It was not only competent, but important and material to prove the existence of the debts of Baum & Kullman to the appellees prior to the confessions of the judgments in favor of appellants. It was also competent to prove the existence of the debts by the admissions of Baum & Kullman, made before the judgments were confessed. If the debts were evidenced by notes, which are, in this respect, but written admissions of the debtor, the notes would be admissible in evidence.—*Mayer v. Clark*, 40 Ala. 259; *Pugh v. McRae*, 2 Ala. 393. (2) The general pecuniary condition of Baum & Kullman was a fact of importance, which the appellees are permitted to prove.—*Harrell v. Mitchell*, 61 Ala. 270. For this purpose the declarations of Baum & Kullman, made before the confessions of the judgments, are admissible.—*Goodgame v. Cole & Co.*, 12 Ala. 77; *Simerson v. Branch Bank*, 12 Ala. 205; *Dubose v. Young*, 14 Ala. 139. (3) On the admissibility of the declarations of Baum & Kullman the following authorities were also cited and discussed: *Sally v. Gooden*, 5 Ala. 78; *Remy v. Duffee*, 4 Ala. 365; *Horton v. Smith*, 8 Ala. 73; *Reed v. Smith*, 14 Ala. 380; *Pearce v. Nix*, 34 Ala. 183; *Alexander v. Caldwell*, 55 Ala. 517; *Jones v. Norris*, 2 Ala. 526; *Hodge v. Thompson*, 9 Ala. 131; *Garner v. Bridges*, 38 Ala. 276; *Borland v. Mayo*, 8 Ala. 104.

STONE, J.—On the trial in the court below a charge was asked by appellants, the charge refused, and an exception reserved. No mention is made of that exception in the arguments of counsel, and we suppose it is not insisted on. The vice of the charge is, that it sought to have the jury perform a service which the court alone was competent to perform. The only questions for our consideration arise on the admission of testimony offered by plaintiffs below, and objected to by defendants—appellants in this court. The record does not purport to set out all the evidence, but only enough to raise the questions.

The plaintiffs below were attaching creditors of Baum & Kullman. These attachment suits were reduced to judgment before the trial was had. The Eagle & Phoenix Company, one of the attaching creditors, offered proof tending to show its claim was contracted in September, 1880, and was evidenced by an acceptance payable at the First National Bank in Montgomery, November 20–22, 1880. The acceptance being dishonored, the attachment was sued out in the evening of the last day of grace. We are not informed when the claim of Dunham, Buckley & Co., the other attaching creditors, was contracted.

On the 22d day of November, 1880—hour of the day not
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shown—Baum & Kullman, merchants, confessed six several judgments in favor of the defendants in the court below—appellants here—for various sums, aggregating about \$8,150, besides costs. Executions on these confessed judgments were issued on the same day, and placed in the hands of the sheriff, who proceeded to levy them on the stock of merchandise in the store-house of Baum & Kullman. The sheriff sold these goods in January, 1881, and realized for them something over \$9,000. The attachments of the Eagle & Phoenix Manufacturing Company and Dunham, Buckley & Co., the appellees, were issued on the same day, November 22d, 1880, and were received by the sheriff and levied on the merchandise the same day, but after the levy of the executions issued on the confessed judgments. The attaching creditors notified the sheriff not to pay over the money realized from the sale of the merchandise, to the execution creditors; that they, the attaching creditors, claimed priority of payment, and that they attacked the confessed judgments as fraudulent. The sheriff thereupon reported the facts to the court, and asked for instructions as to the disbursement of the money. An issue was then formed, and tried before a jury; the attaching creditors being actors or plaintiffs, and the execution creditors being defendants; all the cases being tried together. The real issue tried was *fraud vel non* in the confession of the judgments, and the exceptions relate to conduct of, and conversations with Baum & Kullman, the common debtors of all the contestants, extending over a period of about one month anterior to November 22d, 1880.

Many cases have arisen, and been decided in this court, presenting a contest between an attaching or execution creditor on one side, and a purchaser on the other. The rule in such cases is, that a purchaser who has paid value, without notice, actual or constructive, of a fraudulent intent on the part of the seller, stands unaffected by the intention of the seller in making the sale, no matter how fraudulent that intention may have been. The reason is, that the purchaser, in fair trade, innocently parts with his property or money, and it is neither the mandate of the law, nor the requirement of morals, that he should suffer for the evil design of another. It rests on the fact that something valuable has been parted with, or some fixed liability incurred, as the consideration of the conveyance or transfer. If the conveyance be gratuitous, or, if the purchaser have notice, actual or constructive, of the seller's purpose to defraud his creditors, then the evil design of the seller taints the title of the purchaser.—*Wells v. Morrow*, 38 Ala. 125; *Crawford v. Kirksey*, 55 Ala. 282; *Lehman, Durr & Co. v. Bryan*, 67 Ala. 558. Out of this has grown a well considered and well settled principle of evidence, namely: That in such contests, which most usually

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arise in "trials of the right of property"—a proceeding under our statutes—the admissions and declarations of the debtor, made anterior to the sale, under which the claimant asserts title, are not admissible evidence against him to show a fraudulent intent on the part of such debtor in making the sale, provided the sale was on valuable consideration, and the purchaser is not chargeable with knowledge of the fraudulent intent.—*Smith v. Rogers*, 1 Stew. & Por. 317; *Jones v. Norris*, 2 Ala. 526; *Oden v. Rippetoe*, 4 Ala. 68; *Abney v. Kingsland*, 10 Ala. 355; *Newcombe v. Leavitt*, 22 Ala. 631; *Mahone v. Williams*, 39 Ala. 202; 2 Brick. Dig. 18, § 71; *Pickett v. Pipkin*, 64 Ala. 520; *Bradley v. Ragsdale*, *Ib.* 558. It is contended for appellants that the questions raised by this record fall within the principle stated above.

But, it must be borne in mind that the appellants in this case are not purchasers of the merchandise, and are not shown to have surrendered or parted with anything valuable. They are simply creditors, asserting a lien—a first lien—in virtue of their executions, first received by the sheriff, and first levied. This record contains no evidence of the time when their several claims accrued, other than the judgments confessed, if those judgments were evidence for or against strangers, of the existence of the liabilities therein acknowledged.—1 Brick. Dig. 823, § 273. Taking, then, the time when the judgments were confessed—November 22d, 1880—as the first and only evidence of the debts, there is nothing in this record to show that any act done by, or conversation had with Baum & Kullman, offered in evidence, took place after the judgments were confessed. It is our duty to presume every thing in favor of the correct ruling of the City Court, which the record does not affirmatively show to be otherwise. 1 Brick. Dig. 781, §§ 118, 120. In *Horton v. Smith*, 8 Ala. 73, it was decided that the declarations of a holder of personal property, with regard to his rights and liabilities, are evidence against any one coming after such declarations into his place, or representing him in respect to such rights and liabilities. See, also, *Goodgame v. Cole*, 12 Ala. 77. The general rule that recitals in a deed, made by a debtor, or admissions by him at the time of its execution, are not evidence to prove the debt in a contest with others, must be confined to declarations and admissions made *after* the creation of the contesting creditor's debt.—*Goodgame v. Cole*, *supra*; *Dubose v. Young*, 14 Ala. 139; *Gillespie v. Burleson*, 28 Ala. 551; *Pearce v. Nix*, 34 Ala. 183; *Alexander v. Caldwell*, 55 Ala. 517.

Applying this principle to this case, it justified the admission in evidence of acts, declarations and conversations of Baum & Kullman in relation to their property, the debts due to the at-

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taching creditors, and their plans and purposes in regard to their payment, at least until the contestants showed themselves to be creditors. None of the testimony given by plaintiffs' witnesses against the objection of defendants, is shown to have been illegal.

Affirmed.

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Bill in Equity against an Administrator for an Account, Settlement and Distribution.

1. *Judgments and decrees on the merits final and conclusive.*—No principle of law is better settled than that the judgment of a court of competent jurisdiction, rendered on the merits, as between the parties, is final and conclusive of the matter in controversy, so long as it remains unreversed; and this principle applies alike to the decrees of the court of chancery and the judgments of courts of law.
2. *Decree dismissing bill; when conclusive.*—The decree of a court of chancery dismissing absolutely and unconditionally a bill filed by two heirs against the administrator of their intestate's estate, seeking to compel him to make a settlement and distribution of the estate, rendered on the hearing, on pleadings and proof, is an adjudication of the merits of the cause against them, and constitutes a bar to a subsequent bill filed by the survivor of them, one having died, seeking the same relief, although such decree was founded on an erroneous decision as to the validity of certain decrees rendered by the probate court in which the administration of the estate was pending, and set up in defense of the suit by the administrator.
3. *Former adjudication; what issues covered thereby.*—When there is no question as to the jurisdiction of the court, or as to the identity of the parties, the inquiry, whether the subject-matter of the controversy has been drawn in question and is concluded by a former adjudication, is determined, when it is ascertained that the matters of the two suits are the same, and the issues in the former suit were broad enough to have comprehended all that is involved in the second suit.
4. *Decree dismissing bill on the merits; effect of can not be avoided by showing that bill was unskillfully drawn.*—The force and effect of a decree of a court of equity dismissing a bill on the merits, can not be obviated by the complainant invoking his negligence or unskillfulness in pleading.

APPEAL from Montgomery Chancery Court.

Heard before Hon. H. AUSTILL.

The bill in this cause was filed on 3rd September, 1879, and its material averments and purpose may be summarized as follows: In 1858, George W. Pettis died intestate in Montgomery county, in this State, seized and possessed of an estate consisting of real and personal property, and leaving him surviving Mary W. Pettis, his widow, and Theophilus, George W., James

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B. and Mary S. Pettis, his only children and heirs at law. On 23rd September, 1858, Felix M. Tankersly was appointed by the Probate Court of said county the administrator of the estate of said decedent, and he qualified as such by giving bond with Alfred Pool and others, as his sureties thereon, and entered upon the discharge of the duties pertaining to his trust, taking possession of the assets of the estate, portions of which he afterwards sold under the decree of the Probate Court, and collected the purchase-money therefor. Afterwards Theophilus and George W. Pettis, jr., died intestate, and said Tankersly was appointed by said court administrator of their estates; and he was also appointed guardian of James B. and Mary S. Pettis, who were minors. Afterwards, and prior to the filing of the bill in this cause, James B. Pettis died intestate; and thus Mary S. Pettis was left the only surviving heir at law of George W. Pettis, sr., deceased. Her three brothers died while minors, without issue, and owing no debts. The bill then avers, "that after said Tankersly became the administrator of the estates of Theophilus and George W., jr., and guardian of said James B. and your oratrix, he pretended to make divers settlements in said Probate Court of all of said estates; and on the 28th day of November, 1865, he made what purports to be a final settlement of the estate of said George W. Pettis, sr., while so acting as guardian as aforesaid, and as administrator of the estates of said Theophilus and George W., sr.; and that since that time he has taken no further steps in the administration of the estate of George W. Pettis, sr., in said Probate Court, and said Probate Court has not, since said last named day, had any proceedings instituted therein in regard to said administration, and no final settlement of the same has been made." The bill is filed by Mary S. Pettis against Felix M. Tankersly, individually, and in his different representative capacities, Alfred Pool and Mary W. Pettis; and the prayer is, that the administration of the estate of George W. Pettis, sr., be removed into the Chancery Court, "and there settled according to the rules of equity, and for general relief."

The defendant Tankersly answered the bill setting up, among other things, in bar of the relief sought thereby, the settlement made by him in the Probate Court; and he also incorporated in his answer the following plea: That on or about the 14th September, 1866, James B. Pettis, now deceased, and the complainant, by their next friend, "filed their bill in the Chancery Court for Montgomery County against this defendant and the sureties on his administration and guardian bonds, to compel a settlement of the said estates and guardianships, charging and alleging the same facts as are charged and alleged in the present bill of complaint, and seeking to have a settle-

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ment of said estates and guardianships in said Chancery Court, and asking that the said settlements made in the Probate Court by this defendant should be set aside, and that he account as such administrator and guardian in said Chancery Court;" that he answered the bill, and testimony was taken in the cause made thereby; that on the hearing, on pleadings and proof, the chancellor was of the opinion that the complainants were not entitled to relief, and thereupon caused a decree to be entered, dismissing the bill, and taxing the costs of suit against the next friend; that said decree was still of full force, and that "said bill and suit involved the same matters now sought to be litigated." He also avers in his answer, that afterwards, in May, 1873, the complainant and her brother, James B. Pettis, filed in said Chancery Court a bill of review for the purpose of reviewing and reversing the final decree rendered in the original cause, and that such proceedings were had thereon, that a final decree was rendered in said court, from which an appeal was taken to this court, and on that appeal the bill of review was dismissed.—See *Tankersly v. Pettis*, 61 Ala. 354.

On the submission of the cause, a transcript of the record and proceedings had in the cause made by the original bill filed by James B. and Mary S. Pettis on 14th September, 1866, referred to in the answer, was read in evidence. That bill averred the death of George W. Pettis, sr., and of his two children, Theophilus and George W., jr., and the appointment of Tankersly as administrator of their estates, and also his appointment as guardian of James B. and Mary S. Pettis, substantially as they are averred in the bill in this cause. That bill was filed against Tankersly, and certain parties who are averred to be sureties on his bonds as the administrator of said estates, and as guardian of said minors; but no process is prayed against him as administrator or guardian. The bill charged that prior to 16th May, 1860, said Tankersly had in his hands, as administrator of the estate of the elder Pettis, after payment of all the debts of said estate, the sum of \$4,919.32, derived from the sales of property belonging to the estate, and from other sources, "which he used for his own benefit, lending the whole or a large portion thereof at usurious interest, without ever accounting for the usurious profits, or otherwise using it for his own benefit;" and that during the war he received other large sums in Confederate money, with which he paid the expenses of his wards, and the costs and expenses of said several estates, and with which he pretended to have purchased certain Confederate bonds, as an investment for complainants. It is further charged in the bill, that said Tankersly, on 31st October, 1865, filed in the Probate Court his several accounts as administrator of said estates, for final settlements of his administrations,

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charging himself with certain amounts "in good money," and in other amounts in Confederate money, which he claimed to have on hand; but the bill does not aver that such settlements were ever had, or that such accounts were ever passed on by the court. And also that on 28th November, 1865, he resigned as guardian of complainants, and filed his accounts as such guardian for final settlement, and that "on said final settlement," the complainants "were allowed" certain amounts. The bill contains an interrogatory as to the use the said Tankersly made of the money belonging to said estates from 1858 to 1865. The prayer of the bill is, "that said settlements in the Probate Court be set aside, and that said Tankersly and his said sureties be compelled to account with, and to pay your orators, or to some one in trust for them, as in equity and good conscience they ought, and for other or further relief." The defendants answered, admitting that Tankersly had \$4,919.32 at the time stated in the bill, denying that he used any of the money for his own benefit, or that he made more than lawful interest, and alleging that the Confederate money and bonds received by him were received in good faith in payment for property sold, and for debts due, and that he fully accounted in settlements made by him in the Probate Court for all the assets. A demurrer was incorporated in the answer, but the record fails to show that it was passed upon. At the March term, 1868, of said court, the cause having been heard on pleadings and proof, the following decree was entered: "This cause came on to be heard, and was submitted for decree at the last term on the pleadings and the testimony, and was held over for consideration until the present term. And now, on consideration, it is ordered, adjudged and decreed that the complainants' bill of complaint be dismissed, and that the next friend of complainants pay the costs of this suit, for which execution may issue."

The transcript of the record in the cause made by the bill of review, referred to in the defendant's answer, and also transcripts from the Probate Court of final settlements made by Tankersly of his administrations upon said estates, on 28th November, 1865, and also of final settlements made by him of his guardianships of complainant and her brother, James B. Pettis, on 23rd December, 1865, were also introduced in evidence.

On final hearing, had on the pleadings and proof, a decree was entered, taking jurisdiction of the estate, and ordering the administrator to file his accounts and vouchers for a final settlement of his administration upon the estate of George W. Pettis, sr.; and that decree is here assigned as error.

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SAYRE & GRAVES and WATTS & SONS, for appellants. (1) Whether there was a settlement of the estate of George W. Pettis, sr., in the Probate Court, was the direct question presented by the bill filed by James B. and Mary S. Pettis in 1866; and that is the direct question presented in this case. The parties are substantially the same; the allegations of the two bills are different only in form, and not in substance, and the same relief was authorized by the prayers of both bills. The decree in the first case necessarily determined the right of the complainants to an account and settlement in the Chancery Court. (2) The first bill shows upon its face that it was not a bill to correct errors either of fact or law. Considered as such a bill, no relief could have been granted. Eliminate from it the averments touching the invalidity of the settlements in the Probate Court, and it is clear that the averments in reference to the usurious rate of interest would confer no jurisdiction. The allegations as to usury only affected the *amount* to be recovered on the settlement. (3) The dismissal of a bill in chancery will be presumed to be a final and conclusive adjudication on the merits, whether they were or were not heard and determined, unless the contrary appears, and such a dismissal is a bar to any subsequent bill.—Freeman on Judgments, § 270. (4) If the inconsistency of the positions occupied by Tankersly had not been set up as depriving the Probate Court of jurisdiction, it could and ought to have been done. “A party can not try his action in parts. The judgment is conclusive, not only of the matters contested, but as to every other thing within the knowledge of complainant which might have been set up as a ground of relief in the first suit.”—Freeman on Judgments, §§ 272, 260, 249, 255–59; *Cromwell v. Co. of Sae*, 94 U. S. 352; *Ragland v. Calhoun's Adm'r*, 36 Ala. 606; *Wittick v. Traun*, 25 Ala. 319; *Thompson v. Roberts*, 24 How. (U. S.), 241; *Mayor, &c. v. Wetumpka Wharf Co.*, 63 Ala. 611; *Case v. Beauregard*, 101 U. S. 688; *Aurora City v. West*, 7 Wall. 82.

R. M. WILLIAMSON and J. N. ARRINGTON, *contra*.—(1) Estoppels by judgments and decrees should never be allowed to prevail, unless the matter set up be “certain to every intent, and not be taken by argument or inference.”—*Miller v. Hampton*, 37 Ala. 342. (2) In order to make a plea of former judgment good, it must appear that the same point was in issue in the former suit, and was necessarily passed upon and determined.—*Hamner v. Pounds*, 57 Ala. 348; *Strauss v. Meertief*, 64 Ala. 299; Wells on Res Adjudicata, §§ 216–17; *Lawrence v. Hunt*, 10 Wend. 80; *Chrisman v. Harman*, 29 Gratt. 494; *Hughes v. United States*, 4 Wall. 236; *Russell*

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v. Place, 94 U. S. 606. See also *Cook v. Burnley*, 45 Texas, 97; *Durant v. Essex Co.* 7 Wall. 109; *Foster v. Busteed*, 100 Mass. 409; *Burlen v. Shannon*, 99 Mass. 200. The issue must also be material, and the judgment final and upon the merits.—Big. on Es. (2d Ed.), 20–1. (3) In the case made by the bill filed in 1866, the decree rendered was final, was on the merits, and was conclusive of the matter within the *issue of that case*, but that issue was not the same as the issue presented by this bill. The first bill did not authorize the Chancery Court to set aside the settlement of the estate of the elder Pettis, made in the Probate Court. It did not aver that any settlement had in fact been made; but merely that the administrator had *filed* his accounts for that purpose. The mere filing of the accounts, without being *passed on by the court*, can not operate as a settlement.—*Rhodes v. Turner*, 21 Ala. 210; *Ashley v. Ashley*, 15 Ala. 15; *Hollis v. Caughman*, 22 Ala. 478. It did not make Tankersly a party *as administrator or guardian*, and there is no prayer for the removal of the estates into the Chancery Court; and the court would not thus order without a *proper bill*, and a *special prayer* therefor.—Story's Eq. Pl. § 41, note 2; *Sharp v. Taylor*, 11 Sim. Rep. 50; *Pearson v. Darrington*, 21 Ala. 169. That bill is very carelessly and loosely drawn; but by arguing a little, inferring much, and enlarging greatly the meaning of words, it may be regarded as one seeking to recover usurious interest made by the administrator, and to set aside the final settlements made by Tankersly *as guardian of James and Mary S. Pettis*. As a bill to charge the administrator with usurious interest, it was without equity; and as a bill to correct errors of law or fact, under the statute, it set out no decree, and did not even aver that a decree was made. Such a bill should have been dismissed, without demurrer or motion, on the hearing.—1 Brick. Dig. p. 731, § 1343. And when dismissed, it is conclusive simply of this: That the complainants had not presented to the court any intelligible state of case, in which they had suffered any wrong, or been deprived of any rights. (4) If the first bill was so defectively framed, that the particular relief here prayed could not have been granted, although by amendment it could have been so framed as to embrace it, the former decree is no adjudication of the matter presented by this bill. That decree was on the case then made, and it can not be regarded as upon a case not before the court.—*Lawrence v. Vernon*, 3 Sumn. 20; Big. on Es. 54, note; *Greenwood v. Greenwood*, 29 Cal. 521; *King v. Chase*, 15 N. H. 16; *Lawrence v. Hunt*, 10 Wend. 80; *Mersereau v. Pearsall*, 19 N. Y. 108; *Wright v. DeKlyne*, 1 Pet. C. C. Rep. 199. Argument or inference can not be indulged to raise an issue in the first case, that was not so stated

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that relief could have been granted.—*S. & M. R. R. Co. v. Lancaster*, 62 Ala. 555; *Duckworth v. Duckworth*, 35 Ala. 70. If the bill, then, was so framed, that the relief here sought could not have been granted, the relief here prayed has not been passed on, and could not have been adjudicated in that case. *Munter v. Linn*, 61 Ala. 492.

BRICKELL, C. J.—The original bill was filed by the appellee, as the sole surviving heir and distributee of her deceased father, George W. Pettis, to compel the appellant, Tankersly, as his administrator, to an account, settlement and distribution. A former bill filed by the appellee and her brother, James B. Pettis, now deceased, for a like purpose, was by the court of chancery, on a hearing on pleadings and evidence, dismissed absolutely and unconditionally. One ground of defense urged to the present bill is, that the decree in the former suit is a bar; and if well taken, is decisive of the controversy.

No principle of law is better settled, than that the judgment of a court of competent jurisdiction, rendered on the merits, as between the parties, is final and conclusive of the matter in controversy, so long as it remains unreversed.—*Trustees v. Keller*, 1 Ala. 406; *Mervine v. Parker*, 18 Ala. 241; *Wittick v. Traun*, 25 Ala. 317. The principle applies alike to the decrees of the court of chancery and the judgments of the courts of law.—*Hutchinson v. Dearing*, 20 Ala. 798. The decree of a court of chancery, dismissing a bill, absolutely and unconditionally, on a hearing on pleadings and evidence, is an adjudication of the merits of the controversy, forming a bar to any future litigation of the same matters between the parties or their privies. A decree of that kind, not made because of insufficient pleading, or for want of jurisdiction, or for some cause not touching the merits, if not intended to be final and conclusive, is accompanied with words of qualification, with some appropriate terms, indicating that it is not intended to preclude future suit, such as that the dismissal is *without prejudice*. If the case is of a character that such a reservation ought to be made, and it is omitted, on appeal, the error will be corrected.—*Danforth v. Herbert*, 33 Ala. 497; *Burns v. Hudson*, 37 Ala. 62. When, however, the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties.—*Durant v. Essex Co.* 7 Wall. 109; *Bigelow v. Winsor*, 1 Gray 301; *Foote v. Gibbs*, *Ib.* 412; *Kelsey v. Murphy*, 26 Penn. St. 78; *Borrowscale v. Tuttle*, 5 Allen, 377; *Oggsbury v. La Farge*, 2 Comst. 113; *Rosse v. Rust*, 4 Johns. Chan. 300; Freeman on Judgments, § 270; 2 Dan'l Ch. Pr., § 1009.

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When the record of the former suit is carefully examined, it is not matter of conjecture, or of presumption merely, that the decree was rendered on the merits, and was intended to be final and conclusive—an adjudication, that there was no liability resting on the appellant to account to the appellee for his administration. The decree was probably based on the hypothesis that the settlements of the administration made by the appellant in the court of probate, and of his guardianship of the appellee, and of her then co-plaintiff, James B., were final and conclusive. The decrees on those settlements were pleaded in bar of that bill, as they are now pleaded in bar of the present bill. The court may have erred in its opinion touching the validity of those settlements. It may be, as is now argued by the counsel for the appellee, that as judicial proceedings they are void; that the dual relation of the appellant as administrator of the father, George W. Pettis, and of two of his deceased children, divested the court of probate of jurisdiction to settle the principal administration. The court of chancery of necessity decided that question, and had jurisdiction to determine it finally, shutting out all future inquiry, where its decree may be drawn in question collaterally.

When, as in the present case, there is no question as to the jurisdiction of the court, or as to the identity of parties, the inquiry, whether the subject-matter of the controversy has been drawn in question, and is concluded by a former adjudication, is determined, when it is ascertained that the matters of the two suits are the same, and the issues in the former suit were broad enough to have comprehended all that is involved in the issues in the second suit. The inquiry is not, what the parties actually litigated, but what they might and ought to have litigated in the former suit. For the bar of a judgment or decree, if litigation is quieted and parties are not twice vexed for the same cause, must extend to all facts which are necessarily involved in the issue. The main, controlling issue in the former suit, as in the present suit, was the liability of the appellant to account for his administration of the estate of the elder Pettis. All other matters involved in the former suit were the mere incidents of this liability. We do not inquire whether the former bill was skillfully drawn, presenting the liability of the appellant in the most appropriate form. A party can not obviate the force and effect of a judgment against him, by invoking his negligence or unskillfulness in pleading, when that is not the ground of judgment. The right of the appellee, as heir and distributee, to a settlement of the administration, the liability of the appellant as administrator to account to her, were distinctly presented. There was no matter connected with her right, or with the liability of the

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appellant, which could not have been litigated in the former suit. If the former bill was, as is now insisted, so defective in its frame that the appellee could not have obtained full relief, the duty of amendment rested upon her. To suffer her to speculate on the chances of obtaining a favorable decree on insufficient pleading, and after an adjudication against her on the merits, to assail it because of the insufficiency of the pleading, would be manifestly unjust, and would encourage negligence and protract litigation. A judgment is conclusive of the entire subject-matter of controversy, of all that properly belongs to it—of all that might and ought to have been litigated and decided.—Wells' Res Adjudicata, §§ 248–9. We are of opinion that the decree in the former suit was a final adjudication of all the matters now proposed to be litigated, and a full bar to this suit.

The decree of the chancellor is reversed and a decree must be here rendered dismissing the bill at the costs of the appellee, in this court, and in the court of chancery.

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Motion to quash Execution and enter Satisfaction of Judgment.

1. *Power of this court over results of former erroneous rulings as to Confederate transactions.*—This court can exert no power over the hardships which have resulted from former erroneous rulings in reference to Confederate transactions. They present, however, “strong claims for concession, compromise and adjustment, graduated by a scale approximating true values.”

2. *Judgments on contracts based on Confederate prices conclusive.*—A judgment rendered in 1871 on a promissory note executed in 1864, for purchase-money of personal property then bought at an administrator's sale, is conclusive between the parties, and can not be assailed or scaled on account of Confederate prices.

3. *Merger of judgment; what does not operate as.*—A judgment having been rendered against the husband for goods purchased by him, a portion of which consisted of articles of comfort and support of the household, etc., a condemnation of the wife's statutory separate estate to the satisfaction of a stated part of such judgment, covering only the value of the articles of comfort and support of the household, is not a merger of the original judgment, but is merely auxiliary to its collection; and it operates a payment only when, and to the extent it is made available.

APPEAL from Greene Circuit Court.

Tried before Hon. WM. S. MUDD.

This was a motion by Thomas W. Roberts to enter satisfac-

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tion of a judgment recovered on 2nd November, 1871, in said court by John P. Rice, as the administrator of the estate of Henry Pippin, deceased, against him, John V. Wright and Charles Hays, for \$623.80, and to quash an execution issued thereon. As shown on the trial of the motion, this judgment was rendered on a promissory note executed by Wright, as principal, and the other defendants, as sureties, on 3d March, 1864, for the amount of the judgment, and was given for certain articles of personal property which said administrator sold on that day under the orders of the probate court, and which were purchased by Wright. These articles were sold for Confederate prices, at a time when only Confederate money was in circulation. The real value of the articles purchased in the currency of the United States was \$164.10. The property purchased consisted in part of plantation implements to the value, in Confederate money, of \$72.50, in the currency of the United States, of \$39.04, the remainder consisting of such articles of comfort and support of the household as the statutory separate estate of the wife are liable for under the statute. It was also shown that the suit was defended, but that, under the rulings of this court in *Hill v. Erwin*, 44 Ala. 661, the defendants were not allowed to show that, by agreement of the parties, said note was to be paid in Confederate money, or to show the value of the articles purchased at said sale in the lawful currency of the United States. At the spring term, 1874, of said court, on notice and motion under the statute, based on said judgment, certain property belonging to the wife of the defendant Wright, as her statutory separate estate, was condemned to sale for the payment of \$135.06 of said judgment, the amount ascertained by the verdict of a jury as the value of the articles purchased by her husband at said sale, for which her statutory separate estate was liable. This amount Mrs. Wright afterwards paid. No steps were taken to enforce the payment of the balance of the judgment against said defendant from April 24, 1875, until 4th November, 1880, when the execution sought to be quashed was issued.

The motion sets out the foregoing facts, and there was no controversy in reference thereto on the trial. The court charged the jury, at the written request of the plaintiff in execution, that if they believed the evidence, they must find the issues in his favor, and said Roberts excepted. The giving of this charge is here assigned as error.

GREEN B. MOBLEY, for appellant.

WM. P. WEBB, *contra*.

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STONE, J.—The present record presents another of the hardships, which have grown out of erroneous rulings in reference to Confederate transactions.—*Nelson v. Boynton*, 54 Ala. 368; *Baker, Lawler & Co. v. Pool*, 56 Ala. 14. Over such hardships we can exert no power. They present strong claims for concession, compromise and adjustment, graduated by a scale approximating true values.

The judgment rendered in the original cause of Rice, Administrator, v. Wright, Hays and Roberts, like all other judgments rendered by courts of competent jurisdiction, is forever conclusive between the parties, unless reversed, or assailed on grounds not presented in this record.—*Baker v. Pool, supra*; *Bobe v. Stickney*, 36 Ala. 482; 2 Brick. Dig. 145; *Ib.* 466, § 33.

Neither is there anything in the argument that the proceeding against Mrs. Wright's statutory separate estate, and its condemnation, is a merger therein of the original judgment. In truth, the order condemning Mrs. Wright's property, was in no sense a judgment against her. The judgment against Wright, her husband, and his sureties was not the consideration on which the latter judgment was rendered. It was only a jurisdictional predicate, on which to found the proceedings for condemnation. It furnished no evidence of the liability of the statutory separate estate. That had to be proved, as in other actions at law; and, on proper proof, a condemnation of the separate property would follow, although the proof of liability fell far short of the amount of the judgment against the husband. This grows out of the fact, that while the husband is liable for the whole amount of the debt contracted, the estate of the wife can be charged only to the extent specified in the statute. *Cheatham v. Newman*, 59 Ala. 547; *McMillan v. Hurt*, 35 Ala. 665; *Wright v. Preston*, 55 Ala. 570; *Wright v. Rice*, 56 Ala. 43; *Lee v. Tannenbaum*, 62 Ala. 501. As well contend that a judgment in garnishment is a merger of the judgment against the defendant in execution, or that a judgment condemning property, levied on under ancillary attachment, merged the judgment rendered in the suit, in aid of which it was sued out. All such suits are but aids in the collection of the principal debt, and are payment only when, and to the extent such auxiliary suits are made available.

The judgment of the Circuit Court is affirmed.

[Abernathy, Adm'r, v. Bankhead.]

Abernathy, Adm'r, v. Bankhead.

Bill in Equity by Administrator to charge Parties who have converted Personal Assets of the Decedent's Estate, as Trustees in invitum.

1. *Bill by administrator against parties who have converted personal assets of estate; when without equity.*—An administrator has a plain and adequate remedy at law against parties who have taken, received or interfered with moneys and other personal assets belonging to his intestate's estate; and hence, a bill filed by an administrator against such parties, seeking to charge them as executors *de son tort*, or as trustees *in invitum*, is without equity.

2. *Same; when can not be maintained to prevent multiplicity of suits.* The jurisdiction of a court of equity can not be maintained in such case on the ground of preventing a multiplicity of suits, where only three persons participated in the wrong complained of, and only three suits at law are necessary to an enforcement of complainant's rights.

3. *Exemption in favor of widow; power of probate court to determine contest in reference to.*—The powers of the probate court are fully adequate for the settlement of a contest or dispute between a personal representative of a decedent's estate and his widow as to exemptions of personal property claimed by her; and a court of equity will not take jurisdiction in such case, unless some particular reasons for its intervention are shown.

APPEAL from Lamar Chancery Court.

Heard before HON. THOMAS COBBS.

The bill in this case was filed on 7th July, 1881, by John B. Abernathy, as the administrator of the estate of James B. Bankhead, deceased, against Sarah A. Bankhead, John D. Terrell and R. M. Abernathy; and its material averments are substantially as follows: James B. Bankhead died intestate on 1st July, 1880, seized and possessed of real and personal property, and leaving him surviving his widow, the said Sarah A. Bankhead, and several brothers and sisters, and children of deceased brothers and sisters, as his heirs at law, the complainant and the defendant, R. M. Abernathy, being children of a deceased sister. The complainant and defendants and Mrs. L. N. Guyton, a sister of the decedent, having met at his late residence on 9th July, 1880, for the purpose of searching for a last will and testament, which they failed to find; the said widow produced and had counted \$3,899.80 all consisting of gold and silver, except \$118, in "greenbacks," as all the money which the decedent had on hand at the time of his death, and which constituted the greater part of the personal property be-

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longing to said estate. At the request of the parties present, who were interested in the estate, the defendant Terrell, who was a brother of the widow, consented to act as the administrator of the estate, and to apply for letters so soon as the law would permit, he stating that letters could not be issued until forty days after the date of the death of the decedent. He then paid to Mrs. Guyton, out of said gold and silver, the sum of \$237.34 in full payment of two claims which she held against the decedent, for which she receipted him as administrator, the receipts having been dated forward so as to appear to have been made after his appointment as administrator. The balance of the gold and silver was then delivered to him by the widow, "as they pretended," for safe-keeping until he could obtain letters of administration. After about two months delay, Terrell refused to take out letters of administration, and claimed that he had handed the money back to Mrs. Bankhead; and on 2d February, 1881, letters were granted to complainant by the Probate Court of Lamar county. In October or November, 1880, the defendant Abernathy, who had a claim against the decedent for services rendered, amounting to \$550, applied to Terrell for payment; and thereupon Mrs. Bankhead, acting on advice given her by Terrell, let said Abernathy have, in part payment of his claim, personal property belonging to the estate of said decedent, of the value of \$227.50, with the understanding that he was to make out his claim against the estate, and transfer it to her, she to pay him the balance of his claim, which was to be thereafter "established and agreed on;" and on 21st December, 1880, he obtained from her, as an additional payment on his claim, a bale of cotton belonging to said estate, of the value of \$48.50. Afterwards said defendant Abernathy sold the property which he obtained from Mrs. Bankhead, and used the proceeds. After the complainant was appointed administrator of the estate of said decedent, Mrs. Bankhead claimed and retained certain personal property belonging to the estate, of the value of \$443, as exempted to her under the statute; but refused to include in her exemption the personal property which she let the defendant Abernathy have in part payment of his claim, as demanded by the complainant. Afterwards the complainant demanded of her and the defendant Terrell the money which had gone into their possession after the decedent's death, as above stated, and, after some delay, he obtained from them, in money and receipted claims against the estate, \$1,641.30; but the balance of the money Mrs. Bankhead, acting under the direction and advice of Terrell, refused to deliver to him.

The bill further charges that Mrs. Bankhead and the defendant Abernathy are insolvent; that the property which said

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Abernathy had received was beyond the "reach of legal process;" that Mrs. Bankhead's delivery of said property was an "election and selection" thereof as a part of her exemptions; that she and the defendant Terrell are executors in their own wrong and trustees *in invitum* of all said money and property, and the "defendant Abernathy is in the same condition as to the property converted by him;" and that "no court of law can force them to account as such trustees with complainant, and there is no other plain and adequate remedy provided in the other tribunals of this State." The prayer of the bill is, that said defendants be decreed to be "trustees *in invitum* of all the property of the estate of complainant's intestate taken into possession by them, and not already accounted for to complainant;" that an account be taken of said matters; that a decree be rendered requiring Mrs. Bankhead and Terrell to deliver to the complainant "the said identical money in their hands;" and for general relief.

The cause was heard on motion to dismiss the bill for want of equity; and on the hearing, the chancellor, being of the opinion that the complainant had a plain and adequate remedy at law, caused a decree to be entered, sustaining the motion and dismissing the bill; and that decree is here assigned as error.

NESMITH & SANFORD and WATTS & SONS, for appellant. (No brief came to the hands of the reporter.)

E. A. POWELL, *contra*. (1) The allegations of the bill do not make the defendant executors *de son tort*. Toller on Executors, pp. 38-40; 1 Lomax on Executors, m. pp. 76-80; 1 Williams on Executors, 148 *et seq.*; Code of 1876, § 2636. (2) A court of equity has no jurisdiction of the case made by the bill, the complainant having a plain and adequate remedy at law.—Code of 1876, § 616; 1 Brick. Dig. p. 639, § 3 *et seq.*; *Prince v. Prince*, 47 Ala. 283; 9 Porter, 636; 5 *Ib.* 161; 1 Dan. Ch. Pr. 609; 1 Story's Eq. Jur. § 458; *The State v. Bradshaw*, 60 Ala. 239; *Weakley v. Gurley*, 60 Ala. 399; *Clark v. Eubank*, 65 Ala. 245; *Stewart v. Stewart*, 31 Ala. 207; *Sadler v. Robinson*, 2 Stew. 522.

SOMERVILLE, J.—It is our judgment that the bill in this case was properly dismissed for want of equity. The remedy of the complainant at law was clear, adequate, and complete for all purposes. When this is so, the remedy at law being neither doubtful nor obscure, the rule has always been that equity will decline to assert jurisdiction; and the statute merely re-affirms this well settled principle of equity jurisprudence.

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1 Story's Eq. Jur. § 33; 1 Daniell's Ch. Pr. 551; 1 Brick. Dig. p. 639, § 3 Code, 1876, § 616.

If the defendants, or either of them, unlawfully took, received, interfered with, or converted any of the assets of Bankhead's estate, the remedy by *trover*, *assumpsit*, or *detinue*, would certainly be as efficacious as a suit in chancery, in the absence of some special ground of equitable jurisdiction, such as the necessity of discovery, complication of accounts, the wasting of the assets by insolvent parties, fraud, or other like sufficient reason.

The jurisdiction of equity is sought to be maintained, as we understand the bill, only on two grounds: *First*, to prevent a multiplicity of suits; and, *secondly*, upon the theory that the defendants, by their wrongful acts, became executors *de son tort*, or in their own wrong.

The first ground is entirely untenable, inasmuch as there are but three defendants to the bill, and at most but three suits at law would be necessary, and, perhaps, only two in the aspect of the alleged conversion being regarded as a joint one by two of the three, as to some of the property.

The second ground is equally without merit. Conceding that the defendants were executors *de son tort*, by reason of their unauthorized meddling with the assets of the estate, they are not liable to creditors, as at common law, in such capacity. The statute so declares, and limits their liability to suits brought by the rightful executor or administrator, holding them responsible "for the value of all the property so taken or received, and for all damages caused by his [their] act to the estate of the deceased," except as to property fraudulently conveyed by the intestate or testator, in reference to which the old rule, not having been abrogated by the statute, remains. Code of 1876, § 2636.

There can be no reason why actions against executors *de son tort* should constitute a class *sui generis*, and be excepted by the courts from the operation of the general rule, that in no case will equity take jurisdiction where the remedy at law is plain and adequate.

It is obvious that the powers of the Probate Court were fully adequate for the settlement of any contest between the administrator of the decedent and his widow, as to the exemption of the personal property claimed by her. That court is constituted by the statute a special tribunal for the adjudication of such contests, in the absence of some particular reason for the intervention of a court of equity.—Code, 1876, § 2841; *Darden v. Reese*, 62 Ala. 311.

Affirmed.

Prickett & Maddox v. Sibert, Adm'r.*Bill in Equity to Enforce Vendor's Lien.*

1. *Vendor's lien ; when does not pass with transfer of note.*—Prior to the act of February 13th, 1879 (Pamph. Acts, 1878-9, p. 171), the transfer of a promissory note, given for the purchase-money of land, by delivery merely, did not carry with it the right to enforce the vendor's lien on the land.

2. *Equitable mortgage ; what does not constitute.*—The fact that a promissory note given for the purchase-money of lands contains a description of the lands, does not create an equitable mortgage thereon for the unpaid purchase-money.

APPEAL from Etowah Chancery Court.
Heard before Hon. N. S. GRAHAM.

DENSON & DISQUE, for appellants.

AIKEN & MARTIN, *contra*.

SOMERVILLE, J.—This is a bill filed to enforce a vendor's lien on certain lands which are described in the note for the purchase-money. The complainant claims as transferee of the note by *delivery* merely, and not by written assignment.

The transfer was made prior to the act of February 13th, 1879 (Pamph. Acts, 1878-79, p. 171), which expressly authorizes such transactions either by writing or delivery. Under the decisions of this court, therefore, it did not carry with it the right to enforce the vendor's lien on the land in controversy. *Bankhead v. Owen*, 60 Ala. 457; *Hightower v. Rigsby*, 56 Ala. 126.

The case of *Bryant v. Stephens*, 58 Ala. 636, it is true, holds that an equitable mortgage is created where the lands are described in the note given for the purchase-money. But this case has been expressly overruled by this court in the recent case of *Tedder v. Steele*, 70 Ala. 347.

The decree of the chancellor must be reversed and the cause remanded.

[Renfro Bros. v. Merryman & Co.]

Renfro Bros. v. Merryman & Co.*Petition for Rehearing under the Statute.*

1. *Rehearing under the statute; when applicant not without fault.* Where a claimant to personal property levied on under an execution attended court on Wednesday and Thursday of the first week of the term to which the execution was returnable, with his testimony and attorney, ready to attend to the claim suit, but finding that the cause had not been docketed, he and his attorney left; and afterwards, on another day of said term, in the absence of the claimant and his attorney, and without notice to them, the cause was placed on the docket and on the same day, without his testimony, tried, another attorney who had been employed by the claimant in other cases, but not in the claim suit, through mistake, and without the claimant's knowledge, appearing for, and representing him, of which the claimant knew nothing until after the adjournment of the court,—*held*, that the claimant was not without fault, and hence, was not entitled to a rehearing under the statute, although he had a meritorious defense to the suit.

APPEAL from Tallapoosa Circuit Court.

Tried before Hon. JAMES E. COBB.

This was an application for a rehearing under the statute by Renfro Bros., the appellants, and the facts disclosed by the record are as follows: John Merryman & Co., the appellees, having recovered judgment in the Circuit Court of said county against John Chisholm, caused an execution to be issued thereon returnable to the fall term, 1880, of said court. The sheriff of said county having levied this execution on certain personal property, the appellants claimed the property, filing with the sheriff the statutory affidavit and bond, which were, with the execution, returned to court. At the fall term, 1880, the appellees recovered judgment against the claimants in the claim suit; and this application was made within four months thereafter, when a *supersedeas* of the execution was granted. At the spring term, 1881, the cause was tried before the court without a jury upon an agreed state of facts, which is substantially as follows: The claim, affidavit and bond were interposed by Renfro Bros. before the fall term, 1880, of said court. Forney Renfro, one of the firm of Renfro Bros., visited Dadeville, the county site, on Wednesday and Thursday of the first week of the court at said term, with his evidence and attorney, to attend to the case. The case was not docketed until Saturday of said week, and after Renfro and his attorney had gone home. Another attorney, who had been employed in other

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cases by the appellants, but not in said claim suit, through a mistake appeared as attorney for the appellants, and without their knowledge tried the case in the absence of their evidence, and lost it. Of this trial the appellants did not know any thing until after the adjournment of said court. Said cause was not docketed and set for trial on any particular day of said court by the clerk, but it was tried on the day it was docketed. To said suit the claimants had a meritorious defense.

The court denied the motion, and dismissed the *supersedeas*, and the appellants excepted, and here assign said ruling as error.

W. J. SAMFORD and J. M. CHILTON, for appellants.

Name of counsel for appellee not disclosed by the record.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—A defendant prevented from making his defense, or a plaintiff from supporting his cause of action, by surprise, accident, mistake or fraud, without fault on his part, against whom a judgment is rendered in a court of law, may, within four months thereafter, obtain a rehearing upon a proper application.—Code of 1876, §§ 3161–71. The statute is intended to provide in the court rendering the judgment a less expensive and more speedy remedy than is afforded by a resort to a court of equity in such cases. The class of cases in which the statute authorizes the court of law to interfere, is precisely the class of cases in which a court of equity is accustomed to afford relief against judgments at law; and in the numerous decisions which have been pronounced on the statute, this court has kept steadily in view the principles on which courts of equity proceed in granting the relief which a court of law may under its provisions extend.

Waiving all other considerations, it is manifest the appellants were wanting in reasonable diligence in the prosecution of the claim suit in which the judgment was rendered. The affidavit made by them, and the execution of the bond were the primary and initiatory steps in the institution of a suit; these introduced the suit into the Circuit Court. Reasonable diligence required them to be active in the prosecution of the claim. The inadvertence of the clerk in omitting to enter the suit on the docket, it was their duty to cure by directing his attention to the omission. That omission did not work a discontinuance of the suit; and it was the duty of the clerk, when he discovered it, to rectify it by docketing the cause. When docketed, it was within the discretion of the court to call the cause for

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trial at any time during the term, a particular day not having been set for the trial.—*Womack v. Bookman*, 34 Ala. 38.

With all the proceedings had during the term the appellants are conclusively presumed to have had notice, because the law devolved on them the duty of being present, until, by some positive action of the court, the cause was disposed of, or a disposition thereof was made by agreement with the adverse party.—*Speed v. Cocke*, 57 Ala. 209. It was not without legal fault on the part of the appellants, that the judgment of which they complain was rendered against them. If they had exercised reasonable diligence, the diligence which the law exacts of all suitors, the meritorious defense they now prefer, could have been made available, preventing the judgment. The want of such diligence is as fatal to their right to relief as would be the absence of a meritorious defense.

Affirmed.

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Bill in Equity to enforce the Specific Performance of a Contract to convey Land.

1. *Construction of Contract.*—S. & H., being seized and possessed of a tract of land, entered into a contract with B., by which they agreed to sell to B. a certain tract of land, and to convey the same to him on payment of the purchase-money; B. agreeing to pay a stated amount in cash, to give his promissory notes for the balance, payable respectively on the first days of January, 1877, 1878 and 1879, and to execute to S. & H. a mortgage on the crops of cotton to be grown by him on said land during the years 1877, 1878 and 1879, as security for the payment of said notes, and to ship all of said crops of cotton to them, to be by them sold and the proceeds applied to the extinguishment of such of said notes as might be then unpaid. On the same day S. & H. executed to B. a bond, conditioned to convey the land upon the full payment of the purchase-money therefor; and B. made the cash payment, gave his notes as agreed on, and executed to S. & H. a mortgage on said cotton crops, reciting that it was executed to "more effectually secure the payment of said promissory notes as they respectively mature;" providing that, upon payment of the notes at maturity, the mortgage should become void, and containing a power of sale on default in the payment of the notes, or either of them, the proceeds of sale, after paying the expenses of the sale, to be applied to any balance that might be then due and unpaid on the notes. These notes B. paid at or before their maturity, but shipped no cotton to S. & H.—*Held*, on bill filed by B. for a specific performance of the contract of sale,

1. That the contract of sale, the bond for title and the mortgage, having been executed on the same day, by and between the same parties, and relating to the same subject-matter, must be construed together as one and the same transaction.

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2. That the agreement to execute the mortgage and the mortgage as executed were intended as additional security for the payment of the notes, and the stipulation for the delivery of the cotton was only inserted for the purpose of making the security more certainly available; that the payment of the notes at maturity was a compliance with the agreement and a satisfaction of the mortgage, and that B. was entitled to a specific performance of the contract.

APPEAL from Hale Chancery Court.
Heard before Hon. CHARLES TURNER.

The bill in this cause seeks the specific performance of a contract executed by Thomas W. Sims and Dempsey Harrison, as vendors, by which they agreed to convey certain lands to Parham N. Booker, and was filed on 21st October, 1879, by Eva H. Knight and Martha K. Booker, claiming, by a written assignment, the rights and interest of the said Parham N. Booker under said contract, against Thomas W. Sims, Parham N. Booker, and the personal representative and heirs at law of Dempsey Harrison, who departed this life, intestate, after the execution of said contract. On the hearing, the chancellor caused a decree to be entered granting the relief prayed, and also filed an opinion, which is substantially adopted by this court. The opinion of the chancellor sufficiently states the case made by the record, and is as follows:

TURNER, CH.—“Sims & Harrison, as judgment creditors of Booker and Knight, acquired title to lands known as the ‘Peck Place’ by purchase at execution sale. Pending and subject to the right of redemption, in settlement of all claims against Booker and Knight, they entered into a contract bearing date April 4th, 1876, in and by which they agreed upon their part to sell to Parham N. Booker the ‘Peck Place,’ and to convey the same to him upon full payment of the purchase-money, and to execute bond for titles. On his part Parham N. Booker agreed: *First*, to pay five thousand dollars in cash; *second*, to execute promissory notes for the balance, payable in specified sums respectively on January 1st, 1877, 1878, 1879 and 1880, with the privilege of anticipating payment, at a discount of ten per cent.; *third*, to retain the presence and services of Ed. W. Booker and Wm. N. Knight in the management and cultivation of the place, to which they also agreed; *fourth*, to execute a mortgage upon the crops of cotton to be grown on said lands in the years 1877, 1878 and 1879, so as to secure the payment of said notes, or so much as should remain unpaid, and to ship all of said crops to Sims & Harrison, to be by them sold and the proceeds applied to the extinguishment of such of said promissory notes as may then be unpaid.

“On the same day Sims & Harrison executed their bond for

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title in the usual form, binding themselves to make conveyance of the land upon the payment of \$14,745.06, said bond to be void upon a redemption from the sale under which they held. On the same day Parham N. Booker executed to Sims & Harrison a mortgage upon the crops to be raised upon the place during the years 1877, 1878 and 1879.

"The purchase-money stipulated to be paid has been paid, and the assignees of Parham N. Booker seek by this bill a conveyance of the land.

"The defendants Sims & Harrison object to such a decree, because they say that, by the terms of the contract, and as part consideration for the sale, the crops for three years were to be shipped to them, upon the sale of which they expected commissions as merchants; that none of said crops were shipped, and the contract was not in that respect complied with. They, therefore, insist that before the complainant can have a specific performance of the contract, they must compensate them for the loss of said commissions.

"The case hinges solely upon the construction to be given to the contract between these parties, as evidenced by these three instruments. These instruments, having been executed upon the same day, between the same parties, and touching the same subject-matter, are to be construed together, as evidence of one transaction, and effect given, as far as possible, to each; the object of such construction being to arrive at the intention of the parties.

"Exhibit 'A' to the bill is to be construed and treated as the memorandum of the original contract or agreement of the parties; and Exhibits 'B' and 'C,' as the execution and carrying into effect of the stipulations of said agreement. By the original agreement Sims & Harrison sold the land, and obligated themselves to give a bond for titles. Exhibit 'B' is the bond which, in accordance with that obligation, they executed, and which complainants' assignor accepted as a compliance therewith. This instrument is a straight-out bond for the conveyance of land upon the payment of certain sums at certain fixed times. Standing by itself, it presents no other consideration for the conveyance than the payment of the money. In that respect it is in strict compliance with the terms of the original memorandum. In paragraph numbered 1 of that agreement, Sims & Harrison agree to make conveyance 'upon the full and complete payment of the purchase-money of the same, as hereinafter stipulated.' In argument an attempt is made to refer the expression, 'hereinafter stipulated,' to all the subsequent stipulations of the agreement. The natural and logical reference is to the next succeeding paragraph, which prescribes the amount and times of payment, and is, in fact, the only stipula-

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tion in the memorandum as to the *payment* of the purchase-money; and it is upon *payment*, and upon payment only, that the *bond* is conditioned, and the agreement to sell and convey is predicated. This construction becomes all the more apparent, when we turn to the mortgage, and observe the construction which the parties themselves put upon their agreement. This mortgage is in the usual form of a crop mortgage. It recites the execution of the notes for the purchase of the land, and the security of the land therefor; recites a willingness upon the part of the grantors therein 'more effectually to secure the payment of said promissory notes as they respectively mature.' The defeasance is in the following words: 'This conveyance is intended as a mortgage to secure the payment of said promissory notes at the maturity thereof respectively, and upon such payment these presents shall become void. But if default be made in the payment of said promissory notes, or any one of them, in every such case the said grantees are hereby authorized and empowered to take possession of the personal property herein conveyed, and sell the same in the city of Mobile, in the usual course of trade, or at public outcry in the town of Greensboro, in said county of Hale, after ten days notice of the time, terms and place of sale, either by posters or hand-bills, or in some newspaper published in said county; the proceeds of such sale shall be applied to paying the expenses of making said sale, and then to the payment of such of said promissory notes as may be then due and unpaid.'

"The sole purpose of this instrument is security for the payment of the purchase-money notes; and it is only upon failure to pay, that the mortgagee is entitled to sell the crops to be raised, and then only to the extent of the amount of the purchase-money remaining unpaid. This instrument was executed and accepted as a compliance with the terms of the original memorandum; and if the intention of the parties is to be derived from the plain, unambiguous language of these instruments, construed as one, it is evident, that no idea of commissions upon the sale of crops entered into the minds of the parties, as forming any part of the consideration for the purchase of the lands. Even in the agreement itself no mention is made of commissions, and a strict construction of the clause thereof in regard to the shipment of crops would exclude all idea that Sims & Harrison were to have any commissions upon sales, the language being, 'and to ship all said crops to said Sims & Harrison, to be by them sold and the *proceeds* applied to the extinguishment of such of said promissory notes' as may be then unpaid. In order to infer from this expression a promise to pay or allow commissions upon sales, we must add something to the words used, or infer that Sims & Harrison were cotton

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commission merchants, and were to sell in the regular course of trade, which nowhere appears in the agreement. The mortgage, however, provides that, in the case of a sale of crops to satisfy the debt, the expenses should be first paid from the proceeds of said sale; but the agreement provides that the *proceeds* (without any allowances) should be applied to the debt. Uninfluenced by any custom among commission merchants, I should, upon reading this agreement, conclude that there was one commission house willing to receive a debt due them, with interest, without exacting commissions upon the sales of cotton raised upon the lands held by them as security for such debt.

"The sole consideration expressed in, or to be inferred from these instruments, is the money stipulated to be paid for the land. Upon the payment of the money, the obligation of the purchaser was discharged, and his equitable right to the lands perfected. All the other stipulations of the agreement were designed as security for the prompt payment of the money consideration."

The decree rendered is here assigned as error.

THOS. SEAY, for appellant.

JAMES G. GARRETT, *contra*.

STONE, J.—The only argument urged for reversal rests on the averment that, in addition to the payment by Booker of the purchase-price of the land, he bound himself to deliver to Sims & Harrison for sale the cotton crops to be grown on the plantation during the years 1877, 1878 and 1879; and that he had failed to do so. This argument rests for its support on the agreement of bargain and sale, executed by all the parties. Even if that agreement be considered alone, we doubt if the foregoing is its true interpretation. The mortgage to be given on the crops was manifestly intended as security for the payment of the purchase-money, and the stipulation for delivery was only inserted for the purpose of making the security more certainly available.

But the agreement of bargain and sale must not be construed alone. Carrying out its stipulations, the vendors, Sims & Harrison, executed a bond to Booker, conditioned to make him title on the payment of the purchase-money notes, without a word said about the delivery of cotton; and Booker, the purchaser, executed a mortgage on the crops, expressly stipulating it was given to secure the purchase-money notes, and to be void, if the notes were paid at maturity. It is admitted as fact, by agreement found in the record and signed by all the counsel, that the first three of the purchase-money notes were paid as

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they severally matured, and the last was paid nearly a year before its maturity. We fully concur with the chancellor in the relief he granted, and substantially in the arguments by which he reached his conclusions.

Affirmed.

Gordon, Rankin & Co. v. Tweedy.

Bill in Equity by Creditors to set aside Fraudulent Conveyance.

1. *Husband and wife; competency as witnesses for each other.*—In civil cases, husband and wife are competent witnesses for each other, to prove any fact that did not come to their knowledge through the channel of the conjugal relation or which is manifestly not confidential. This embraces all matters which must have been intended by them to be made public, and the disclosure of which would not be a violation of marital confidence, or tend to engender matrimonial discord.

2. *Consideration of deed to land assailed for fraud; admissibility of parol evidence as to.*—When a deed to land, reciting a valuable consideration, is assailed for fraud by creditors of the grantor, it may be sustained by parol proof of a valuable consideration different from that expressed or recited, provided it is of the same general character, and not inconsistent with it; as the promissory notes of a third party, instead of money; or stock in a railroad corporation other than that recited in the deed.

3. *Release of dower by the wife, as consideration of conveyance to her by the husband.*—The release by a married woman of her inchoate right of dower in her husband's lands, may be a valuable consideration for a conveyance of other lands to her by the husband, whether the release is executed contemporaneously with the execution of the deed, or in pursuance of a previous agreement; but such contracts between husband and wife must be reasonable and free from fraud, in order to be sustained in a court of equity, when the husband's deed to her is attacked by creditors, and should be especially scrutinized when the husband is at the time insolvent, or in failing circumstances.

4. *Value of inchoate right of dower, when consideration for a deed; how estimated.*—In a suit in equity by creditors of the husband to have a deed to land, executed by him to his wife, set aside as fraudulent and void, standard annuity tables, founded in human experience and observation, furnish the proper rule by which the court should ordinarily be governed in computing the probable value of the wife's inchoate right of dower in lands, conveyed by the husband to a third party, the release of which forms a part of the consideration of the deed to her, which is assailed by the husband's creditors; but in no event should the value of the dower interest exceed one-sixth of the value of the lands.

5. *Deed assailed for fraud; burden of proof on grantee.*—When a conveyance is assailed by creditors of the grantor on the ground of fraud, the burden of proof is on the grantee to establish the existence, the amount, and the validity of the recited consideration.

6. *Transfer of stock in a private corporation; when can not be proved by parol.*—When a transfer of stock in a corporation is shown to have

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been entered on the books of the corporation, it can not be proved by parol or secondary evidence, unless a proper predicate is first laid therefor.

7. *Husband's liability to the wife for interest on her statutory separate estate.*—Under the statutes regulating the estates of married women, the husband is not liable for interest on moneys belonging to the statutory separate estate of his wife which were used, or converted by him; and hence, interest thereon is not such a consideration as will support a conveyance by him to her, when assailed by his creditors on the ground of fraud.

8. *Husband's liability for interest on wife's equitable estate.*—Nor is the husband liable for interest on moneys belonging to his wife's equitable estate, which he has used or converted, in the absence of an agreement on his part to pay interest, or an express dissent on her part to the use thereof by him; and, hence, interest thereon will not support a conveyance by him to her, when assailed by creditors, in the absence of such agreement on his part, and of such dissent on her part.

9. *Inadequacy of price, a badge of fraud; when fraud will be inferred from it alone.*—Inadequacy of price is a badge of fraud; and when the inadequacy is so great as to shock the conscience—when the price is so far below the market value of the property, as to strike the understanding of an honest and intelligent man with the conviction that the sale never could have been made in good faith—fraud may be inferred from it alone; and the case is strengthened when other badges of fraud, such as the embarrassed pecuniary condition of the debtor, the pendency of suits against him, etc., are also shown.

10. *When conveyance of land fraudulent for inadequacy of consideration.*—The deed attacked by creditors of the grantor in this case, tested by the principles above stated, is held constructively fraudulent; conveying, as it does, to the wife of the grantor a tract of land worth between \$4,000, and \$5,000, the consideration therefor being a relinquishment by her of her inchoate right of dower in another tract, which the husband had sold and conveyed, the value of which is not satisfactorily shown, an indebtedness for railroad stock worth \$485, the alleged property of the wife, which the husband had sold, and converted, the transfer of which to the wife is not proved by legal evidence, and a further indebtedness to the wife for moneys belonging to her, which he had used, and interest thereon, amounting to \$646; it also being shown that at the time of the execution of the conveyance, the husband was financially embarrassed.

11. *Deed constructively fraudulent; when a security for real consideration shown.*—When a deed is fraudulent in fact, and, for that reason, void as against existing creditors of the grantor, it will not be permitted, on attack by the creditors, to stand for the purpose of re-imbursement or indemnity to the grantee; but when, as in this case, it is only constructively fraudulent by reason of inadequacy of consideration, and financial embarrassment of the grantor at the time of its execution, it may stand as a valid security for the consideration actually paid.

12. *When transfer of choses in action held free from fraud.*—It was further held in this case, that a transfer of choses in action, made by a husband, who was in failing circumstances, to his wife, was free from fraud, actual or constructive; it being shown that the transfer was based on an adequate consideration, and it not sufficiently appearing that, if there was a fraudulent intent on the part of the grantor, the grantee participated therein.

13. *Parol agreement to convey lands; when statute of frauds not applicable to.*—A parol agreement between husband and wife, by which he agreed to convey to her lands or other property, in consideration of a relinquishment of her inchoate right of dower in other lands which he desired to sell and convey, may be proved by her in support of a convey-

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ance executed to her by the husband, reciting a valuable consideration, not inconsistent with that sought to be proved, as against creditors of the husband, attacking the conveyance on the ground of fraud. Such an agreement is only voidable under the statute of frauds, and the protection of the statute can not be invoked by the creditors, if the benefit thereof is repudiated by the husband.

14. *Executed contracts; statute of frauds not applicable to.*—Such agreement having been executed, the statute of frauds has no application.

15. *Earnings of the wife the property of the husband.*—At common law, the earnings of the wife during coverture belonged to the husband; and this principle is not abrogated by our statutory system.

APPEAL from Lawrence Chancery Court.

Heard before L. B. COOPER, Esquire, Special Chancellor.

The bill in this cause was filed on 27th May, 1875, by Gordon, Rankin & Co., Adams, Thorne & Co., and others, creditors of Robert E. Tweedy, against him and his wife, Harriet O. Tweedy, for the purpose of having set aside and cancelled, as fraudulent and void, a deed executed by Robert E. Tweedy to his wife, of date 13th November, 1873, conveying to her a certain tract of land in Lawrence county, particularly described, and containing about three hundred and twenty-eight acres; and certain assignments and conveyances of personal property, consisting of horses, mules, cows, etc., and of a large number of notes, accounts and other choses in action, mortgages and liens, alleged to have been made and executed by him to her; and for the purpose of pursuing certain moneys, alleged to have been paid by him to her, into property purchased with such money; and for the purpose of subjecting to sale for the payment of complainants' demands, the property so conveyed, transferred and purchased, as well as a certain other tract of land, alleged to have been sold and conveyed by one Harris to Mrs. Tweedy "in satisfaction of a debt which he owed said Robert E. Tweedy." The bill also seeks a discovery of the property and choses in action conveyed and assigned by him to her, and of the money realized therefrom, or collected thereon, and of the amount of money which he had paid to her. The bill charges that, at the time of the execution of the several conveyances and assignments, Robert E. Tweedy was insolvent; that said conveyances and assignments were without valuable consideration, and were executed and accepted for the purpose of hindering, delaying and defrauding the complainants, and the other creditors of the said Robert E. Tweedy. The indebtedness of Robert E. Tweedy to the complainants aggregated a sum exceeding \$10,000, on most of which judgments had been obtained prior to the filing of the bill. It is not averred or shown, however, when the several suits at law were commenced; the only testimony on this point being that he "was sued in the latter part of 1873," and that some of his debtors

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were garnisheed in February, 1874; but some of the judgments were obtained in the early part of 1874, and the others in the latter part of that year. The complainants' demands, however, were contracted prior to the 13th November, 1873, and a large portion of them matured before that date. A copy of the deed from Robert E. Tweedy to his wife, of date November 13th, 1873, is made an exhibit to the bill. The consideration of the deed, as recited therein, is the following items of indebtedness owing by him to her, to-wit: (1) \$315, the proceeds of the sale of thirty shares of "N. & Chattanooga R. R. stock," and \$170, the proceeds of the sale of seventeen shares of "M. & C. R. R. stock," which stock belonged to Mrs. Tweedy, "as part of her separate estate," and had been sold by him, and the proceeds applied to his own use and benefit; (2) \$646, a sum theretofore received by him as part of the distributive share of his wife in the estate of her father, which he had also applied to his own use and benefit; and (3) the release by Mrs. Tweedy of her inchoate right of dower in a certain tract of land, in Lawrence county, containing twelve hundred and eighty acres, his interest in which he, as one of the firm of Tweedy, Houston & Co., had conveyed, on 19th March, 1870, for a valuable consideration, to Houston & Bynum. It is further recited that this right of dower was an obstacle to the making of a perfect and complete title, and that Robert E. Tweedy promised his wife, that, if she would release it, he would thereafter purchase other lands of equal value to her right of dower in said tract, and have the title thereto conveyed to her; and that thereupon she released it.

As required by the bill, the defendants answered under oath, each separately. They admit the execution of the deed of 13th November, 1873, and aver that the consideration therefor was as is recited therein. It is also stated in the answer of Robert E. Tweedy, and substantially reiterated in his wife's answer, that "the amount of \$315, proceeds of sale of thirty shares of N. & C. R. R. Stock, and \$170, proceeds of sale of M. & C. R. R. stock, are the correct amounts of money belonging to the separate estate of respondent's wife, received and used by him on 5th November, 1872, *including interest to November 13th, 1873*, the date of the said conveyance. On September 1st, 1869, respondent received from the estate of H. C. Featherstone, father of H. O. Tweedy, \$600, being part of her distributive share in the said estate, and, at the same time, with her consent, he retained the same upon loan and applied it to his own purposes. This, *with \$46 interest thereon to November 13th, 1873*, makes the sum of \$646, as stated in the said deed." They also aver that Mrs. Tweedy's right of dower in the tract conveyed to Houston & Bynum was worth \$2,000.

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They admit that in January, 1874, Robert E. Tweedy assigned to his wife an account due him from R. N. Harris for \$675.75, and, on 4th February, 1874, an account due him from Gibson & Co., for \$1,667, and a note made by W. C. Sherrod for \$1,053, dated January 1st, 1874, and payable to him one day after date; but they deny that he ever transferred or assigned to her any other choses in action, or any other personal property whatever. Certain debts which Robert E. Tweedy owed his wife, it is averred in both answers, constituted the consideration for the assignment of these choses in action. These debts are averred to be as follows: (1) Proceeds of the sale of a carriage owned by Mrs. Tweedy, as "a part of her separate estate," made by him on 1st October, 1865, which he retained with her consent as loaned money, and applied to his own use, \$500, and interest thereon to 4th February, 1874, \$333.30; (2) money borrowed by him from her on 1st January, 1866, which also belonged to her "as part of her separate estate," \$1,672, and interest thereon to 4th February, 1874, \$1,000.24; (3) moneys received by him on 1st February, 1866, on her distributive share in her father's estate, which he also applied to his own use, \$250, and interest thereon to 4th February, 1874, \$160; (4) proceeds of the sale of a buggy owned by Mrs. Tweedy "as part of her separate estate," collected by him on 1st January, 1870, and by him retained with her consent as money borrowed from her, and applied to his own use, \$455, and interest thereon to 4th February, 1874, \$145; and (5) the sum of \$3,000, which, it is averred, he owed her in consideration of a relinquishment of her right of dower, made by her on 4th February, 1874, in two certain tracts of land, situate in Limestone county, one of which, containing seven hundred and twenty acres, he sold and conveyed to James Trabue, and the other, containing one hundred and sixty acres, he sold and conveyed to Wheat & Chesney, both in payment of debts which he severally owed to said grantees. It is further averred that Mrs. Tweedy was unwilling to join her husband in the execution of these deeds, but finally did so, on his promise to "indemnify" her to the amount of \$3,000, and, in payment of that sum, and the other debts which he owed her, to transfer to her "good claims or property" to the amount thereof; and that \$3,000 was a fair and reasonable valuation of her dower interest in said lands.

The defendants, in their answers, also admit that Mrs. Tweedy purchased from R. N. Harris a certain tract of land, particularly described, which lies contiguous to the lands conveyed to her by her husband, by the deed of November 13th, 1873, at and for the sum of \$3,500, one-third of which by the terms of the sale, was to be paid on 1st January, 1875, and the balance, with interest, on 1st January, 1876. The first install-

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ment of said purchase-money she paid, partly by a balance due from Harris on the account which he owed her husband, and which had been transferred by him to her, as above stated, and partly in money belonging to her. The balance of the purchase-money had never been paid, and no deed to the land had been executed to her by Harris.

They also admit that Robert E. Tweedy paid to his wife, on 1st April, 1874, \$1,600, in money, and aver that this amount was paid to her in part payment of what he owed her. They positively deny that there was any fraud in the several transactions above mentioned, and aver that they were all made in good faith. Robert E. Tweedy also denies that he was insolvent or in failing circumstances on 13th November, 1873, but avers that he was then engaged in a flourishing mercantile business, that his credit was then good, and that he met his pecuniary engagements as they matured "to the entire satisfaction of merchants with whom he was dealing." He further denies that he "considered himself insolvent" on 4th February, 1874, and avers that he then considered his assets fully sufficient to meet all his liabilities, and that such would have been the case, had it not been that "he was subsequently prevented by untoward circumstances from collecting the claims due him." Both he and Mrs. Tweedy deny that she, at the dates of said transactions between them, or prior thereto, had any knowledge, or information leading her to believe, that he was then insolvent, or in embarrassed pecuniary circumstances.

The evidence introduced on behalf of the complainants tended to show, among other things, that, during the year 1873, and prior thereto, Robert E. Tweedy was engaged in a large mercantile business in the town of Courtland, in this State; that the larger portion of his sales were on credit; that on 13th November, 1873, he was financially embarrassed, if not insolvent, and his creditors were pressing him for payment; that in January, 1874, he sold his stock of goods, which had been greatly diminished, to one of his creditors for \$800, in payment of a debt, and then ceased business; that thereafter, during the years 1874 and 1875, up to the time of the filing of the bill in this cause, he and his wife were living on the tract of land bought by her from Harris, and that they were farming thereon, as well as on the tract conveyed to her by his deed of November 13th, 1873; that both tracts had been improved after they were acquired, on the Harris tract a dwelling-house having been erected; and that certain personal property, plantation supplies, etc., had been purchased in the name of Mrs. Tweedy, and she was in possession of such personal property. It was also shown that Robert E. Tweedy purchased the land which he conveyed to his wife by the deed of November 13th, 1873,

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from George W. Foster, on 8th November, 1873; and his deed from Foster was read in evidence. That deed recites its consideration to have been \$6,560, to him "in hand paid," etc. This land was also shown to have been then worth from \$10 to \$15 per acre.

The depositions of the defendants were read in evidence on their behalf. To the introduction of these depositions the complainants separately objected, on the ground that the witnesses were husband and wife, and, therefore, incompetent; but the chancellor overruled their objections. Their testimony touching the facts necessary to an understanding of the opinion, except as hereinafter stated, is substantially set forth in the foregoing statement of the contents of their answers. Robert E. Tweedy further testified that he purchased the land which he conveyed to his wife by the deed of November 13th, 1873, from George W. Foster, jr., to whom his father, George W. Foster, sr., had given it, and received a deed therefor from the latter "to save the trouble of making two deeds in place of one;" that he paid for this land in an account of \$800 which George W. Foster, sr., owed him, and in debts of George W. Foster, jr., part of which had been contracted with, and was owing to witness, and the balance he bought up at fifty cents on the dollar, the face of the paper which went in payment for the land being about \$6,500; that George W. Foster, jr., was then insolvent, and witness did not consider the debts against the younger Foster worth as much as fifty cents on the dollar. The complainants objected to the testimony of the witness in reference to the consideration of the Foster deed, on the ground, among others, that it established a different consideration from that expressed in the deed. This objection was overruled by the chancellor. Mr. Tweedy further testified that this land was not worth more than \$3,000 when Foster conveyed it to him, and when he conveyed it to his wife. He further testified that the deed by him to his wife recited the true consideration paid him by her for the land, except that there was a clerical error in the recital of the indebtedness of \$315, the proceeds of the sale of thirty shares of "*N. & Chattanooga R. R. stock*;" that that item of the consideration was in fact the proceeds of the sale of *Nashville & Decatur R. R. stock*, which she had acquired from her father's estate; that the seventeen shares of the Memphis & Charleston Railroad stock mentioned in the deed, was stock purchased from one McMahon in 1869, but was not transferred until August, 1870; that he gave this stock to his wife, and when the transfer was made on the books of the company, it was made by his direction to his wife, and that when the property was sold, it was sold as her property, and the proceeds applied to his own use. It was further shown

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by this witness that his promise to convey lands and other property to his wife in consideration of her releasing her dower interest in the lands conveyed by him to Houston & Bynum, and to Trabue and Wheat & Chesney, were not in writing. The complainants objected to that part of his testimony in reference to these promises, on the grounds, (1) that such promises were not in writing, and (2) because the effect of the testimony as to the promise in reference to the lands conveyed to Houston & Bynum was to establish a different consideration for the deed of November 13, 1873, from that expressed therein. They also objected to "his proving any transfer of any railroad stock to his wife, on the ground that the transfer was in writing, and the testimony offered was secondary. The chancellor overruled these several objections. He further testified that his interest in the lands which he conveyed to Houston & Bynum was worth over \$5,000; that his wife relinquished her dower in said lands in consideration of his paying her "\$2,000 in other property;" that his opinion was that his "wife's expectancy of dower in this land was worth \$2,000, or more;" and that he was then "a man in good health and stout."

Mrs. Tweedy, in her deposition, testified, that the claim on Gibson & Co., which her husband transferred to her, was afterwards settled by her taking the note of E. C. Ashford, a surviving partner of Gibson & Co., but that the note had never been paid. And on cross-examination touching property which, as she testified, she had purchased, she stated that she had made \$250 taking boarders, but it is not shown when she made this money. Both she and her husband explain how she acquired the \$1,672 which, as they testify, and allege in their answers, he borrowed from her in 1866, and which formed a part of the indebtedness supporting the assignment made on 4th February, 1874, and the payment made by him to her in April, 1874. They also examined as a witness O. H. Bynum, whose testimony tended to show, that W. C. Sherrod was very much embarrassed financially in February, 1874, and that his paper was not then worth more than fifty cents on the dollar.

On the hearing, had on pleadings and proof, the chancellor was of the opinion that the several transactions between the defendants were shown by the evidence to have been free from fraud and based on a valuable consideration, and caused a decree to be entered, dismissing complainants' bill. That decree and the rulings on the evidence, noted above, are here assigned as error.

JOHN PHELAN and JOSEPH WHEELER, for appellant.

R. O. PICKETT, *contra*.

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SOMERVILLE, J.—It is now settled by the past decisions of this court, since the act removing, with certain exceptions, all disqualification based on the fact of being a party to a suit, or interested in the issue tried, that, in *civil* cases, husband and wife are competent witnesses for or against each other, to prove any fact which did not come to their knowledge through the channel of the conjugal relation; or, in other words, any transaction which is manifestly *not confidential*. This rule would clearly embrace all matters which must have been *intended* by them to be made public, the disclosure of which would be no violation of marital confidence, or tend to engender matrimonial discord. And such seems generally now to be the settled weight of authority also in other States.—*Chapman v. Holding*, 60 Ala. 522; *Sumner v. Cook*, 51 Ala. 521; *Rowland v. Plummer*, 50 Ala. 182; *Robison v. Robison*, 44 Ala. 227; *Stuhlmuller v. Ewing*, 39 Miss. 447; *Crook v. Henry*, 25 Wis. 569; 1 Greenl. Ev. § 337; 1 Whart. Ev. §§ 428–431. The chancellor did not err in admitting the deposition of the appellee, Tweedy, or that of his wife.

When a deed or other conveyance is assailed for fraud, it is competent to sustain its validity by parol proof of any consideration other than that expressed, provided the two considerations be *consistent*, or of the same general character. It did not vary the legal effect of the deed from Tweedy to his wife to show that a portion of the consideration was the proceeds of the sale of certain stock in the Nashville & Decatur Railroad Company, though recited to be stock of the Nashville & Chattanooga Railroad Company. So the notes of Foster were as much a valuable consideration as the money consideration recited in the deed which was executed by him to Tweedy. The evidence as to the real consideration of these instruments was properly admitted.—1 Whart. Law Ev., §§ 1046–1047; *Mead v. Steger*, 5 Port. 498; *Hinde v. Longworth*, 11 Wheat. 199; *Hair v. Little*, 28 Ala. 236; 1 Parsons Notes & Bills, 194; *Ramsey v. Young*, 69 Ala. 157.

The release by a married woman of her inchoate or contingent right of dower in lands owned by her husband, of which she is lawfully dowable, may constitute a valuable consideration for the execution of a deed by him to her. And the same is true, whether the release be made contemporaneously with the deed, or pursuant to a preceding agreement.—*Hoot v. Sorrel*, 11 Ala. 386; Bump on Fraud. Con. 303; *Bank of U. S. v. Lee*, 13 Pet. 107. Yet such a contract must be reasonable and free from fraud in order to be sustained in equity, and should be especially scrutinized, when made to a wife by a husband who is insolvent or in failing circumstances.—2 Scribner on Dower, 7–8; *Quarles v. Lacy*, 4 Munf. 251; *Burwell's*

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Ex'r. v. Lumsden, 24 Gratt. 443; S. C. 18 Amer. Rep. 648. We are of the opinion that the deed bearing date November 13, 1873, executed by the appellee, Tweedy, to his wife, is, under all the facts of this case, constructively fraudulent, and can not be sustained. The lands conveyed by this deed had been purchased from one Foster, but a few days before, upon a recited consideration of over sixty-five hundred dollars. Making due allowance for the fact that they were partly paid for in Foster's own paper, purchased at fifty cents on the dollar, it is a fair inference, from all the testimony, that they were worth not less than four or five thousand dollars. We deem the consideration of the conveyance to be grossly inadequate. It is recited to be the proceeds of certain railroad stock alleged to belong to the wife which, the testimony shows, sold for the sum of four hundred and eighty-five dollars; the further sum of six hundred and forty-six dollars received as a part of the distributive share of Mrs. Tweedy in her father's estate and used by the husband; and the release by the wife of her *contingent dower interest* in certain lands, the value of which is not stated. What the value of these lands was, or that of the wife's right of dower in them, does not clearly appear from the testimony taken in the cause. The appellee, Tweedy, estimates the lands as worth about five thousand dollars, and the inchoate right of dower at *two thousand dollars*, which latter sum, he testifies, was the amount agreed to be paid for the wife's relinquishment.

The right of dower is, of course, merely contingent, being dependent upon the wife's good behavior, and the further fact of her surviving her husband. And while it is a valuable interest, which was the subject of conveyance by fine at common law and by deed with us, it is more or less valuable according to the ages, state of health, and even the habits of the husband and wife.—*Bullard v. Briggs*, 7 Pick. 533; Code, 1876, § 2470. And, under the provisions of our statutes, the right may be barred entirely, should the statutory separate estate owned by the wife at the time of the husband's death be equal to, or greater in value than her dower interest.—Code, 1876, §§ 2715–2716. The statute further provides, in cases where lands of a decedent are sold by order of the probate court, and the widow consents to have her dower interest sold with them, that the value of the dower right shall be "ascertained by proof, having regard to the age and health of the dowress," but it shall in no case be estimated at more than "*one-sixth* of the purchase-money."—Code, 1876, §§ 2470–71. When the right is inchoate, as of necessity it is before the death of the husband, it can not be so valuable as after his death, because it is contingent and may be defeated by the death of the wife, or the forfeiture of it by her misbehavior. Standard annuity

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tables, founded in human experience and observation, furnish the proper rule by which chancery courts are ordinarily governed in computing the probable present value of such a contingent interest.—1 *Scribner on Dower*, 333; 2 *Ibid.* 6; *Jackson v. Edwards*, 7 Paige, 386, 408–410; *Bartlett v. Vanzandt*, 4 Sandf. Ch. 396. The case of *Beavers v. Smith*, 11 Ala. 20, announces no principle in conflict with this rule. The question there was the proper valuation of a vested dower interest, not a contingent or inchoate one. And though held by this court in *Martin v. Wharton*, 38 Ala. 638, that such an inchoate right of dower was not available as a set-off under the statute, on the ground that it could not be measured with sufficient accuracy by any pecuniary standard, we apprehend that the powers and machinery of a court of equity are for the purpose here sought fully adequate to this end, at least by approximation. It is known that in modern times, characterized among other things by the rapid growth of the business of life insurance, it has become a common thing for actuaries to calculate values of this contingent nature upon the basis of standard annuity tables, and tables of mortality giving the probable duration of human life at every age. And this duty being here imposed by the requirements of this case, we know of no other possible way of determining such valuation than by the rule we have announced.—*Jackson v. Edwards*, 7 Paige, 386, 408.

The appellees in this case have failed to furnish any sufficient data in the testimony, by which we are enabled to ascertain the value of the wife's interest in the lands in which she relinquished her dower. The conveyance being assailed as fraudulent, the burden of proof was cast upon the grantee to prove the existence, amount and validity of the recited consideration. *Hamilton v. Blackwell*, 60 Ala. 545. In the absence of such proof we can not regard this portion of the consideration.

So the wife's right to the railroad stock is not established by proper evidence of its transfer, and the proof of this portion of the consideration also fails. Such transfer appears to have been made in writing upon the books of the company, and upon this muniment of title the defendant relied. Secondary, or parol evidence, therefore, of this fact was not permissible, unless a predicate had first been laid for its introduction. 1 Whart. Ev., § 61–63.

Neither can *interest* be estimated as a lawful or valuable consideration. The husband is not accountable, under the statute, for the rents and incomes of the wife's *statutory* separate estate, which includes interest on her moneys used or converted by him. It was held by this court in *Earl & Lane v. Owens*, 68 Ala. 171, that a conveyance made by a husband to secure to the wife such rents or incomes, which he had converted to his

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own use, was voluntary and void as to existing creditors, thus overruling the contrary principle decided in *Brevard v. Jones*, 50 Ala. 241. Nor can interest be allowed the wife for the use or conversion by the husband of her *equitable* separate estate, in the absence of an agreement to pay such interest, or of an express dissent on the wife's part objecting to the husband's reception of the same.—*Roper v. Roper*, 29 Ala. 247; *Newlin et al. v. McAfee*, 64 Ala. 357.

Inadequacy of price is usually denominated a badge of fraud, and it is often asserted that no fixed rule can be declared, by which to determine what disparity between the real value of property and the consideration paid will vitiate a conveyance for fraud. We think it settled, however, that fraud may be inferred from the inadequacy of the price alone, where it is so great as to shock the conscience. This must be the case where the consideration is so far below the market value of the property as to strike the understanding of an intelligent and honest man with the conviction that such a sale could never have been made in good faith.—Bump on Fraud. Convey. 44; *Hoot v. Sorrell*, 11 Ala. 386; *Prosser v. Henderson*, 11 Ala. 484. The case is of course strengthened when there are other badges of fraud, such as the financial embarrassment of the grantor, the pendency of suits against him, a secret trust in his favor or other like circumstances of suspicion, some of which appear in this case. The application of the above principle, as made to the particular state of facts presented in *Hoot v. Sorrell*, *supra*, does not meet with our approval.

The deed of Tweedy to his wife, however, may not be fraudulent in fact so as to render it absolutely void. Were such the case, it could not be permitted to stand as security for any purpose of re-imbursement or indemnity to the grantee, but the rule is considered otherwise with "a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent." In the latter case a conveyance may be made to stand as security for the consideration actually paid. *Boyd v. Dunlap*, 1 John. Ch. Rep. 478; Bump on Fraud. Convey. 288; *Potter v. Gracie*, 58 Ala. 303.

There is no force in the objection urged to the parol evidence of the appellee, Tweedy, allowed by the chancellor for the purpose of proving his agreement to convey to his wife other lands or property, in consideration of her relinquishment of dower in the lands sold to Trabue and others. The contract was perhaps only voidable and not absolutely void under the statute of frauds, and the protection of this statute could not be invoked by a third party, if its benefit was repudiated by the party sought to be charged. This defense, under our rulings, is required to be specially pleaded, or else it is consid-

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ered as having been waived.—Browne's Stat. Frauds, § 135; *Garrett v. Garrett*, 27 Ala. 687. Besides, this statute has no application in cases where a contract has been *executed*, as in this case.—Browne's Stat. Frauds, § 116.

We do not see that the chancellor erred in decreeing that the transfer of the note of Harris, that of Gibson & Co., or of Sherrod, was free from fraud. If there was a fraudulent intent on the part of Tweedy, the grantor, it does not sufficiently appear that Mrs. Tweedy, the grantee, participated in it.—*Marshall v. Croom*, 60 Ala. 121.

Nor do we feel authorized to reverse his findings as to the sixteen hundred dollars paid by the appellee to his wife. If there was no fraud in the payment of this money, there was no right on the part of creditors to pursue the fund into the property it was invested.

At common law the husband was entitled absolutely to all the property which the wife acquires by her skill or labor. He can not renounce his right to such services or earnings to the prejudice of existing creditors.—Bump on Fraud. Convey. 248. And there is nothing in our statutory system to abrogate this principle.—*Glaze v. Blake*, 56 Ala. 379. The husband was entitled to the earnings of Mrs. Tweedy referred to in the testimony.

We think the chancellor erred in dismissing the bill in this case. It should have been retained, and the case referred to the register for an account to be taken, showing the amount of Tweedy's indebtedness *bona fide* to his wife, and allowing by way of credit such sums paid her in good faith and authorized by the views expressed in this opinion. No interest, however, can be allowed the wife on any sums constituting her statutory separate estate, and none on amounts constituting her equitable separate estate without clear proof of an express contract to pay it.

The lands conveyed to his wife by the appellee on Nov'r 13, 1873, should be decreed to stand as security only for the fair value of the contingent dower interest, which will be ascertained, on the reference, by data furnished by standard annuity tables, not to exceed in any event one-sixth of the value of the land, and for such other items of the recited consideration as may be shown to be legal and proper under the proof offered, as tested by the above principles. Mrs. Tweedy must also be charged a reasonable amount for rent of the premises from the time of the filing of the bill, and credit for the value of permanent improvements, made by her, and for taxes paid during the period of her *bona fide* occupancy or possession of the premises in question.—*Potter v. Gracie*, 58 Ala. 303; Trial of Titles to

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Land (Sedgw. & Waite), §§ 694-702; *Horton v. Sledge*, 29 Ala. 478.

The decree of the chancellor is reversed, and the cause remanded for further proceedings in accordance with this opinion.

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Action against Railroad Company for Failure to Deliver Freight.

1. *Charges to jury; how given and how construed.*—Charges to jury should be given in reference to the tendencies of the testimony, and should be construed in the light thereof.

2. *Liability of railroad company for loss of freight shipped to a "flag station;" burden of proof.*—Where, in an action against a railroad company, as a common carrier, to recover damages for the failure to deliver a quantity of corn received by it for transportation to a designated point on the road, at which there was neither depot nor agent, it was shown that the corn was received by the company and transported in good condition to the place of destination, and the car in which it was shipped, was placed on a side-track for the consignee, where it remained for several days, with no one in charge of, or protecting it, and that when the corn was taken from the car and measured, there was a deficiency in quantity,—*held*, that the burden of proof was on the plaintiff to show that the loss occurred between the time when the corn was received by the company, and the time when the car containing it was left on the side-track, that being, under the facts of this case, a delivery, and not on the defendant to show that the loss occurred after the car was placed on the side-track.

APPEAL from Blount Circuit Court.

Tried before Hon. LEROY F. BOX.

This case was before this court at a former term, and is reported.—*South & North Ala. Railroad Co. v. Wood*, 66 Ala. 167. It was an action brought by the appellee against the appellant, a railroad corporation, to recover damages for the failure to deliver seventy-five bushels of corn in the shuck, alleged to have been delivered to it for transportation. The defendant pleaded the general issue, "in short by consent, with leave to give in evidence any special matter which might be good, if properly and well pleaded;" and the cause was tried on issue joined thereon, the trial resulting in a verdict and judgment for the appellee. The facts sufficiently appear in the opinion.

THOS. G. JONES and RICE & WILEY, for appellant, cited *Hutchinson on Carriers*, § 760; 2 Greenl. on Ev. § 213.

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HAMILL & DICKINSON, *contra*, cited the former decision in this case, and Angell on Carriers, § 129.

STONE, J.—In the general charge given to the jury in the present case, they were informed that the liability of the railroad terminated when the car, containing the corn, was delivered at the point of destination. The testimony shows that the agreed place of delivery was Smith's mills, a private siding, and not a station on the road. No one was there, or expected to be there, to receive the corn. The testimony tends to show that the car, containing the corn, stood on the siding at Smith's mill as much as seven or eight days, where no one was in charge of it, or protecting it. The testimony tends to show, also, and the jury so found, that when the corn was received by the railroad company, there were three hundred bushels, and that when it came to be measured out there were only two hundred and twenty-four 50-100 bushels. With the finding of the jury, or whether the evidence justified it, we have nothing to do. There are rules for ascertaining how many bushels of corn, in the condition this was in, a car of the given dimensions would hold, and, of course, for ascertaining how much would half fill it, or fill it two-thirds full. But, as we have said, we have nothing to do with these questions. The jury found there was a loss, and we can only inquire whether the law for their government was correctly given in charge to them. The court, among other things, charged the jury, that "in the case of goods delivered to common carriers, for carriage, when there is a loss or damage of the goods, the burden of proof is always on the carrier, to show that his liability terminated before the loss or damage in question occurred." Bearing in mind that the liability of the railroad, as a carrier, terminated when the car was left at Smith's mill, the effect of this charge was to tell the jury, as an independent proposition, that the burden was on the railroad, to prove that the quantity of corn was in the car when it was left on the side-track; and this, without any predicate of proof, or fact, that the quantity in the car was then deficient; in other words, that if the proof showed there were three hundred bushels when the railroad received the corn, then the liability of the railroad was fixed, unless it, the railroad, proved it delivered three hundred bushels. Thus construed, the only fact necessary to be proved by the plaintiff, according to the charge, was, that the railroad received the corn. The burden would then shift, and the railroad would be required to prove, either that the corn was not lost or abstracted while in its possession, or that it was lost after the car left its possession by being placed on the side-track.

In ordinary cases, freight received by a railroad, for trans-

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portation, is to be delivered at one of its stations. The road having an agent at such station, who receives the freight from the train, and delivers it to the consignee, there will, ordinarily, be little or no contest over the matter of delivery. There being, in such case, no intermediary agency, the question of delivery *vel non* is one of simple, naked fact, and susceptible of easy proof. Hence, few controversies are likely to arise on that question. But when, as in this case, there is an intervening period between the time when the railroad rightfully parts with the possession, and the consignee takes actual control—a time when no one exercises actual watch and ward over the freight—it is not unreasonable that disputes should arise, as to when the loss did actually occur. It becomes material to inquire, what proof it was necessary for the plaintiff to make, before the *onus* was shifted to the defendant. Speaking on this subject, Greenleaf, in his work on Evidence (vol. 2, § 213), says; “If the loss or non-delivery of the goods is alleged, the plaintiff must give some evidence in support of the allegation, notwithstanding its negative character.” In Hutchinson’s excellent treatise on Carriers (§ 764), the principle is thus expressed: “Although the claim of the plaintiff, in an action for the loss of the goods, may rest upon negligence, or non-feasance; and not upon a positive misfeasance, and would, therefore, seem to require proof of a negative character, the burden of showing the loss is unquestionably upon him, and he must give some proof of the allegation of the loss, notwithstanding its negative character; and if it be out of his power to show positively the loss of the goods, he must at least show such circumstances as would create the inference against the defendant that they had been lost; as, for instance, that they had been bailed to the carrier a sufficient length of time to be transported to their destination, and had not been there received or delivered to the person entitled to them, to whom they were consigned.” As thus stated, the law casts on the plaintiff the duty of proving non-delivery.—*Woodbury v. Frink*, 14 Ill. 279.

We think much light is shed on this question, by the rule which obtains where freight is received by one railroad company, to be transported over its road, and then delivered to another line running in continuation, and, possibly, to be delivered successively from road to road, until it reaches its destination. We do not gainsay the rule, that when the road receiving such freight stipulates for its delivery at the point of destination, although beyond the terminus of its road, then the owner or consignee can hold the first road responsible for the non-delivery at the point of destination, no matter on which intervening road the loss occurred.—*Mobile & Girard Rail-*

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road Company v. Copeland, 63 Ala. 219. But when, by the terms of the contract, the receiving railroad stipulates to transport to its terminus, and there to deliver to another line running in continuation, and that to another, and so on, as the case may be, the rule is different. If there is a failure to deliver the goods at the point of destination, that, without more, casts the *onus* on neither railroad to account for the loss. To recover against the road receiving the freight with such conditions, the plaintiff must go further, and prove a failure of such receiving road to deliver to the next succeeding road; and if the suit be against either of the other railroads, the plaintiff must prove both a receipt of the freight, and a failure to deliver it, either to the next succeeding line, or at the point of destination, as the case may be. Less than this does not make a *prima facie* case against either railroad company.—Hutch. on Carriers, §§ 106, 108, 759. In *Midland Railway Co. v. Bromley*, 33 Eng. Law & Eq. 235, the suit was against the receiving railway company, whose duty, under the contract, was to deliver the portmanteau, the subject of the suit, to another connecting railway company, the latter company to deliver it at the point of destination. The portmanteau was lost, and did not reach the point of destination. The cause was heard in the court of Common Pleas, and the judges delivered their opinions *seriatim*. JERVIS, C. J., said: "If it [the portmanteau] was stolen, or lost, by the Midland Railway Company, then the defendant's contract was not performed; but, if it was stolen or lost by the Bristol and Exeter Railway Company, then it was performed. The evidence produced at the trial is consistent with each of these suppositions. It is as consistent with the evidence that the portmanteau was lost or stolen by the one company, as by the other; and therefore I think there was nothing to go to the jury." CRESWELL, J., said: "The plaintiff has not given any evidence of negligence on the part of defendant's servants." WILLIAMS, J., said: "It lay on the plaintiff to have given some proof of a non-delivery to the Bristol and Exeter Railway Company." The language of CROWDER, J., was: "The *onus* was on the plaintiff to show that there had not been a delivery of the portmanteau."—See, also, *Gilbart v. Dale*, 5 Adolph. & Ell. 543; *Griffiths v. Lee*, 1 Car. & P. 110; *Anchor Line v. Dater*, 68 Ill. 369; *Chic. & N. W. R. R. v. Northern Line Packet Co.* 70 Ill. 217.

In this very case, the court had charged the jury, "that the burden of proof was on the plaintiff, to show that he delivered the corn to the defendant, which he claims damages for in this suit, and that such corn was not delivered by defendant to the consignee, at the point of destination." This charge recognizes

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the doctrine, that the *onus* is on the plaintiff to prove non-delivery to the consignee. Charges to the jury should be given in reference to the tendencies of the testimony, and should be construed in the light thereof. Thus construing the charge first above copied, we hold the Circuit Court erred in holding, by necessary implication, that the burden was on the defendant, to prove that the corn—the entire three hundred bushels received—were in the car when it was delivered by being left on the side-track at Smith's mill. As to this question, under the contract and facts shown in this case, it was the duty of the plaintiff, and the burden was his, to satisfy the jury, that the loss or abstraction had occurred while the car was in the control of the railroad employes; in other words, that the road had not delivered all the corn it received from the shipper. By delivery, we mean, placing the car containing the corn on the side-track agreed on.

It may be supposed the rule here declared operates very hardly on the consignee, because it requires him to make proof which is negative in its nature. The opposite rule would apparently operate with equal oppression on the railroad. These reflections may suggest the impolicy of making contracts which are so liable to lead to misunderstandings, and to litigation. They can not justify the overthrow or disregard of great legal principles, which are sanctioned and fortified by such distinguished names. The question of delivery *vel non*, or when the loss, if there was a loss, did occur, was and is one for the jury to determine. They must form their opinion and verdict from the facts and circumstances in evidence. In this, they but perform a service often cast upon them, of determining disputed controversies on testimony that is not, or may not be positive, or convincing beyond reasonable doubt. Satisfactory conviction is the measure of proof required in civil causes.

We are aware that, in the rulings above, acute criticism may discover a seeming discrepancy between our ruling when this case was formerly before us, and the present opinion. See opinion in this case on former appeal, 66 Ala. 167. The principle there stated is strictly applicable to a case where freight is delivered, but is found in a broken or damaged condition. In such case, the *onus* is evidently on the carrier to exculpate itself from all blame in the matter of the break or damage. But in this case the question rests on different principles. The question is the non-delivery of the corn,—not the condition in which it was delivered. On this question, as we have shown above, the *onus* is on the plaintiff primarily to make some proof of the non-delivery. This question, as we have shown, being a subordinate one, and of easy proof when the freight is deliv-

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ered at a depot, becomes very material when the freight is delivered at a private siding, as in this case.

Reversed and remanded.

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Bill in Equity to Foreclose Mortgage; and Cross-bill by the Wife of the Mortgagor to establish Trust in Mortgaged Premises.

1. *When trust in favor of the wife will be established in lands purchased by, and conveyed to the husband; protection to bona fide purchaser.*—A court of equity will establish a trust in favor of a married woman in lands purchased by the husband with moneys belonging to her statutory separate estate, and conveyed to him, when the facts, out of which the trust arises, are averred with distinctness and precision, and, if denied or not admitted, are shown by clear, full and convincing evidence; but against such a trust a mortgagee of the husband, who stands in the position of a bona fide purchaser for value, and without notice of the wife's equity, is entitled to protection.

2. *When mortgagee is a purchaser for value.*—A creditor, who accepts from his debtor a note payable at twelve months, for a debt past due, thereby releasing parties who were sureties on the debt, and also takes a mortgage on land to secure the note, is a purchaser for value, and, as such, is entitled to protection against a trust in favor of the debtor's wife, resulting from the fact that the land was purchased with moneys belonging to her as her statutory separate estate, of which the creditor had no notice.

3. *When right of action on a debt is suspended.*—When a note, payable twelve months after date, is taken for an existing debt, the right of action on the debt is thereby suspended until the maturity of the note, although there may be no express agreement to that effect; and sureties on the original debt are thereby released, unless they assented to the arrangement.

APPEAL from Etowah Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed on 20th July, 1879, by the Mobile Life Insurance Company, a body corporate, against R. O. Randall and Josephine T. Randall, his wife, to foreclose a mortgage on land executed by them to secure a debt which the husband, who held the legal title, owed the complainant. Mrs. Randall filed a cross-bill, seeking to have a trust in the land established in her favor, on the ground that the land was purchased with moneys belonging to her as her statutory separate estate. The case made by the record is sufficiently stated in the opinion. On the hearing, had on pleadings and proof, the chancellor caused a decree to be entered granting the relief

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prayed by the cross-bill; and that decree is here assigned as error.

AIKEN & MARTIN, for appellant.

DENSON, DISQUE, & DUNLAP, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The purpose of the cross-bill filed by Mrs. Randall is to establish a resulting trust in the mortgaged premises, upon the ground that they were purchased by her husband, the mortgagor, with money, her statutory estate, held by him as trustee, and the conveyance of the legal estate taken to himself. Trusts of this kind will be established by a court of equity, when the facts from which they arise are averred with distinctness and precision, and, if denied or not admitted, shown by clear, full and convincing evidence.—*Lehman v. Lewis*, 62 Ala. 129; *Tilford v. Torrey*, 53 Ala. 120. There would be much of difficulty in tracing into the purchase of the premises, upon the evidence found in the record, a greater sum than three hundred dollars, of the moneys of Mrs. Randall, and of fixing a lien or trust upon them for an amount exceeding this sum. That is unimportant, however, for if the trust were fully and clearly established, the appellant stands in the relation of a *bona fide* purchaser, without notice, entitled to protection against it.

There is but little, if any, conflict in the evidence. Randall, the mortgagor, was indebted to the Mobile Life Insurance Company in a sum exceeding twenty-six hundred dollars, the debt having been contracted in the course of dealings between them as principal and agent. The company had security for the debt in the form of a bond with sureties, with condition that Randall would account for all moneys received by him as agent. Payment of the balance due from Randall had been demanded by the company, which he was unable, or failed to make. An agreement was made that the account should be settled by Randall giving a note for the amount, payable at twelve months, with interest, and executing a mortgage to secure its payment. The note, bearing date January 13th, 1877, and the mortgage, bearing date the 15th day of the same month, were executed at Gadsden by Randall and transmitted to the company at Mobile, with a statement of the account, in which he credited himself with the note as secured by mortgage.

A *bona fide* purchaser, entitled to protection against prior equities of which he has no notice, is, according to our decisions, one who gives value, yields up an existing right, or changes

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his position for the worse, under the belief that his vendor has title, and is entitled to convey, the belief being justified by the title papers, and all that is at the time apparent to him. When there is a concurrence of these facts, the purchaser has an equity to protection, at least equal to older equities, of which he had no notice, and is not put upon inquiry. The purchase need not be absolute and unconditional—it is enough that value is presently parted with, or credit given on the day of payment of an existing debt extended, or other securities released, and the land taken as a security.—*Boyd v. Beck*, 29 Ala. 703; *Wells v. Morrow*, 38 Ala. 125; *Coleman v. Smith*, 55 Ala. 308; *Cook v. Parham*, 63 Ala. 456; *Thames v. Rembert*, 63 Ala. 561; *Thurman v. Stoddard*, 63 Ala. 336; *Whelan v. McCreary*, 64 Ala. 319.

The distinction recognized and running through these cases is, that a mortgagee taking a mortgage upon the sole consideration of a pre-existing debt or contract, and as mere additional or collateral security for the payment of the debt, or the performance of the contract, is not a *bona fide* purchaser for value—he receives, but gives nothing in return for the mortgage. But if there is a change in the form, character and obligation of the pre-existing debt or contract—if the mortgage is accepted in satisfaction, or, if the debt is presently created, on the faith of the mortgage, or if the day of payment is extended, or any new consideration intervenes, the mortgagee gives as well as receives, and he is a *bona fide* purchaser for value.—*Saffold v. Wade*, 51 Ala. 214.

The difference in the dates of the note and mortgage is unimportant. They were given in consideration of the agreement that the account should be settled by note secured by mortgage, are parts of a single transaction, not closed until they were delivered and accepted by the insurance company. Until delivery, neither note nor mortgage was of any effect, and the delivery of both was simultaneous.—*Edwards on Bills & Notes*, 150; *Coleman v. Smith*, 55 Ala. 368.

Nor do we deem it important to inquire whether the note was taken in payment of the pre-existing debt due from Randall, though the inferences and presumptions arising from the whole transaction are hardly consistent with any other hypothesis than that such was the purpose of the parties, and such the result contemplated. While it is the general rule that the mere giving of a note or bill for a pre-existing debt will not operate a satisfaction of it, yet, it is as well settled that the acceptance of such note or bill on time suspends the right of action on the original debt, until the note or bill becomes due, or is dishonored. *Mooring v. Mobile Marine Dock Co.*, 27 Ala. 254, *McCrary v. Carrington*, 35 Ala. 698.

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When a note or bill is thus taken in consideration of a pre-existing debt, there may be no express agreement that indulgence shall be given on the original debt, until the maturity of the note or bill; nor an express agreement that indulgence or forbearance is the consideration; the parties must be presumed to intend the legal consequences of their acts; and as the legal consequences are the tying up of the hands of the creditor during the period the right of action on the original debt is suspended, securing indulgence to the debtor for that period, the transaction has the legal effect it would have if, in express terms, it had been stipulated such effect should result. The creditor suffers the detriment, the debtor obtains the benefit, which would be suffered or derived, if, in words, the legal consequences of the transaction had been expressed as matter of agreement.—*Hill v. Bostick*, 10 Yer. 410; *Austin v. Curtis*, 31 Vt. 64.

The taking of the note and mortgage was upon an agreement to give time to Randall for the payment of the balance due from him to the company. The indulgence, the extension of the day of payment, was the consideration moving him to give the note and mortgage. The security of the mortgage was the consideration moving the company to give the longer day for payment. This is clearly shown by the evidence of Randall, and of Friend, the secretary of the company. Randall states that the company desired payment of the balance due from him, but said if he would give ample security, he might pay by degrees; and that it was agreed that the company would take the notes and mortgage in settlement of the account. Friend states that the company urged a settlement; Randall wanted time, and proposed, if it was given, to secure the debt by mortgage. The mere giving collateral security for a debt, maturing after the debt is due and payable, may not operate an extension of time of payment, discharging sureties liable for the payment.—*U. S. v. Hodge*, 6 How. 379.

But if the taking of such security is accompanied with an agreement that the time of payment of the original debt shall be extended until the maturity of such security, the agreement must prevail, and the sureties will be discharged.—Grant on Suretyship, § 319. It would contravene, not only the agreement between these parties, but all their purposes and intentions, if it were held that all right of action on the original debt was not at least suspended until the maturity of the mortgage. The right of action being suspended for that period—the day of payment extended, the sureties of Randall not assenting to, or having notice of it, are discharged. There are, then, entering into the transaction, not only the consideration of the pre-existing debt, but two new present considerations—the exten-

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sion of the day of payment, and the release of the sureties on the bond. These new considerations constitute the company a *bona fide* purchaser for value, entitled to protection against resulting trusts, of which they had no notice.

The decree of the chancellor must be reversed, and a decree here rendered dismissing the cross-bill of the appellee, Josephine T. Randall, at her costs, and remanding the cause.

Allred v. Elliott.

Statutory Real Action in the Nature of Ejectment.

1. *Proof of handwriting of subscribing witness to deed; when inadmissible.*—For the purpose of proving the execution of a deed, evidence of the handwriting of a subscribing witness is inadmissible, when it is shown that the witness is within the State. To authorize such evidence, it is necessary to show that the subscribing witness is dead, is out of the State, or is, for some reason, incompetent to testify.

2. *Execution of deed; proof of.*—Where the grantor in a deed which had been lost, the execution and contents of which were sought to be proved, testified that he executed the deed in the presence of two subscribing witnesses, naming them, one of whom was a woman, the testimony of a witness, who had been named by the grantor as the other subscribing witness, that a woman who was absent from the State signed the deed as a witness, is competent, although it is shown that the witness testifying could neither write nor read writing. His inability to write or read writing might impair the weight of his testimony, but it would not render the testimony illegal.

3. *Deed to land; execution of.*—A deed to land, executed by a person who writes or signs his name, is valid, if it is attested by one witness who is able to write, and does write his name.

4. *Charge of court; presumption of title to land.*—In an action of ejectment a charge instructing the jury, that “prior possession for several years, accompanied with the erection of valuable improvements and other acts of ownership, raises a presumption of title,” asserts a correct legal principle; and if its tendency is to mislead, this calls for an explanatory charge, and is no ground for reversal.

APPEAL from Cullman Circuit Court.

Tried before Hon. LEROY F. BOX.

This was a real action under the statute in the nature of ejectment, brought by Joseph Allred against David Elliott, M. G. Kennedy and William Sandlin, and was tried on issue joined on the pleas of not guilty and the statute of limitations of ten years. The defendants claimed title in Mrs. S. C. Kennedy, Elliott and Sandlin being her tenants, and M. G. Kennedy her husband. The land in controversy was entered in 1858 by Joseph Knighton, from whom both parties claimed, the plaintiff

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through one Clayton, and Mrs. Kennedy directly from Knighton. The plaintiff having proved and read in evidence a deed from Clayton to him, executed 6th November, 1869, introduced the deposition of Clayton, whose testimony tended to show, that in July or August, 1868, he purchased the land sued for from Knighton, and went into possession under his purchase, and under a deed which Knighton executed conveying the land to him. This deed, he testified, was attested by William Scott and Mrs. Martha Kitchens, and was duly acknowledged. The deed was shown to have been lost, and was never recorded. The plaintiff then examined as a witness said Scott, who testified that he had signed the deed as an attesting witness by his mark, but this was ruled out by the court on defendants' objection. He further testified, that he could neither write nor read writing. The plaintiff then offered to prove by this witness, "that a woman who could write and who was absent from the State, when last heard of," signed her name to the deed as an attesting witness at the time it was signed by Knighton; but this was objected to by the defendants, their objection sustained, and the plaintiff was not allowed to make the offered proof, and he excepted.

The defendants proved and read in evidence a deed duly executed by Knighton in 1873, conveying said land to Mrs. Kennedy; and for the purpose of proving the execution of a quitclaim deed to said land by one Henderson in December, 1873, to the defendant Kennedy, as husband and trustee of Mrs. Sallie C. Kennedy, the defendants "put a witness on the stand and proved by him, against the plaintiff's objection, the handwriting of Wm. F. Dickinson, a subscribing witness to said paper, who, at the time of the trial, resided and was in Blount county, Alabama. This paper was not acknowledged, probated or recorded, and on the evidence alone as to the handwriting of said subscribing witness, the court permitted said paper to go to the jury," and the plaintiff excepted. As stated in the bill of exceptions, this deed recited a conflict of title to said land between Mrs. Kennedy and Clayton, and Henderson's possession, and his desire to vacate the same and avoid litigation; and by the deed he relinquished and gave up possession to the defendant Kennedy, as husband and trustee. The bill of exceptions further states that the evidence was conflicting as to whether or not the defendant Kennedy had notice of plaintiff's or Clayton's deed, "before he bought the same for his wife, the evidence showing that he did buy the same from Knighton for his wife, and paid therefor \$50, in October, 1873." The defendant Kennedy also "proved possession of said land since 1873, permanent improvements thereon, and their value, under Knighton's deed to Mrs. Kennedy."

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This being the substance of the evidence introduced on the trial, the court charged the jury, at the written request of the defendants, that "prior possession for several years, accompanied with the erection of valuable improvements and other acts of ownership, raises a presumption of title;" and to this charge the plaintiff excepted.

A judgment was rendered for the defendants on verdict, from which the plaintiff appealed; and he here assigns the rulings above noted as error.

HARVILL & DICKINSON and GEO. H. PARKER, for appellant.
(1) That the witness Scott could neither write nor read writing, did not render the offered evidence incompetent, but was merely a fact to be considered by the jury in weighing his testimony.
(2) The subscribing witness Dickinson was shown to have resided, and to have then been in Blount county, in this State. This being the case, the evidence as to his handwriting should not have been admitted.—*Hatfield v. Montgomery*, 2 Port. 58.
(3) The charge given does not assert a correct legal proposition in *this case*. Both parties claimed under documentary evidence of title, and no rights were claimed by prescription. The charge was well calculated to confuse or mislead the jury.

W. T. L. COFER and E. B. McGETRICK, *contra*.—(No brief came to the hands of the reporter.)

STONE, J.—The testimony of the handwriting of the subscribing witness Dickinson, to the deed purporting to be made by Henderson, was inadmissible. To authorize such evidence, it was necessary to show the subscribing witness was dead, was out of the State, or, for some other reason, had become incompetent to testify.—1 Brick. Dig. 855-6, §§ 741, 2, 3.

There was an offer of testimony, by a witness who could neither write nor read writing, that a woman, who was absent from the State when last heard from, did write or sign a second deed offered, as a witness. This statement is somewhat indefinite. It probably pointed to Martha Kitchens as the "woman," who, according to the testimony of the witness Clayton, was one of the subscribing witnesses to the deed from Knighton to him. Thus interpreted, this testimony ought to have been received. Of course, the witness' inability to write, or to read writing, might impair the weight of the testimony he gave, but it would not render it illegal. A deed executed by a person who writes or signs his own name, is valid, if attested by one witness who is able to write, and does write his name.—Code of 1876, § 2145; *Stewart v. Beard*, 69 Ala. 470.

The charge excepted to asserts a correct legal principle.

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Mastin v. Brown, 70 Ala. 235. If its tendency was to mislead, this was a subject for an explanatory charge, but was no ground for reversal.—1 Brick. Dig. 344, § 129.

Reversed and remanded.

Larkin v. Mason.

Bill in Equity by Sureties on Administrator's Bond to Enjoin Collection of Decrees in Probate Court, and to establish Equitable Set-Offs.

1. *Bill in equity by sureties on administrator's bond to enjoin collection of decrees in probate court, and to establish equitable set-offs; when without equity; necessary parties defendant; misjoinder of parties complainant.* On the death of M., intestate, his widow and another qualified as administrators of his estate by executing, with sureties, a joint bond. Afterwards the widow died intestate, without making settlement of her administration; and after her death the surviving administrator executed, with sureties, an additional bond, and thereafter made a final settlement of his administration, on which decrees were rendered against him in favor of the widow's administrator and in favor of the guardian of J. and F., who were the only heirs of M. and also of the widow, each for one-third of the balance ascertained to be due from him. This balance resulted from a *devastavit* committed during the joint administration. The decree in favor of the widow's administrator was paid to him, and by him distributed equally between J. and F. After the rendition of these decrees F. died intestate, free from debt, and leaving J. as her only heir. No executions having been issued on the decrees within twelve months from the date of their rendition, J. and the personal representative of F. separately moved to revive; and thereupon the decree in favor of J. was revived only for a small balance, the court crediting it with \$1,000, as paid by the administrator of M. by the conveyance of land to the common guardian of J. & F.; but, on appeal to this court, the order of the Probate Court was reversed, this court holding that only one-half of said amount should be credited on J.'s decree, and that the balance should have been credited on the decree in favor of F. The decree in favor of F. was revived for its full amount, less \$100, paid thereon; but, after return of execution against M.'s administrator "no property found," an execution was issued against the sureties on both bonds for the full amount of the decree. *Held*, on a bill filed by the sureties on both bonds to enjoin the proceedings in the Probate Court, to have said decrees credited with the \$100, and also with the \$1,000 paid thereon, and to have an account stated of the amount of the *devastavit* committed by the widow during said joint administration, and such amount set off against said decrees,

1. That if the complainants were not concluded by the failure of the administrator of M. to set up the defense of payment, they had a plain and adequate remedy by *supersedeas* in the Probate Court, and for this reason their bill is without equity.

2. That if such a bill could be maintained, the personal representative of M.'s widow would be a necessary party.

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3. That the additional bond having been executed after the widow's death, there was a misjoinder of parties complainant.

APPEAL from Jackson Chancery Court.

Heard before Hon. N. S. GRAHAM.

The bill in this cause was filed on 28th February, 1882, by W. R. Larkin, J. F. Martin, J. Compton, W. B. Keeble and G. W. R. Larkin against James E. Mason, James M. Buchanan and J. B. Tally, as administrator of the estate of Frances W. Mason, deceased; and its material averments are substantially as follows: On 1st August, 1861, Winfield S. Mason departed this life in this State, intestate, leaving him surviving Frances S. Mason, his widow, and Frances W. Mason and James E. Mason, his only heirs at law; and on 14th March, 1862, after an administration in chief, Frances S. Mason and James M. Buchanan were appointed administrators *de bonis non* of his estate by the Probate Court of Jackson county, and thereupon qualified by executing a joint bond, with the complainants W. B. Keeble and J. F. Martin, as their sureties. In 1863 Frances S. Mason died, intestate, leaving as her only heirs at law the said Frances W. and James E. Mason; and one Hopkins was by said court appointed administrator of her estate. No settlement of her administration upon her husband's estate was ever had. After her death, Buchanan executed an additional bond as administrator of the estate of Winfield S. Mason, with the complainants, W. R. Larkin, John Compton and G. W. R. Larkin, as sureties. On 8th April, 1868, Buchanan made a final settlement of the estate of his intestate in said court, when it was ascertained that he was indebted to the estate in the sum of \$3,100, and decrees were rendered against him in favor of the administrator of Frances S. Mason, and the guardian of Francis W. and James E. Mason, who were then minors, each for one-third of said sum. The decree in favor of the administrator of Frances S. Mason was paid in full; and afterwards the amount thereof was distributed equally between, and paid to Frances W. and James E. Mason. The bill charges that the whole of this liability grew out of, and was occasioned by waste and *devastavit* occurring during the joint administration of Buchanan and Frances S. Mason on the estate of said decedent. Afterwards Frances W. Mason died, intestate, and without debts, leaving, as her only heir at law and distributee, the said James E. Mason; and the defendant, J. B. Tally, was appointed the administrator of her estate. No executions were issued on the decrees in favor of the guardian of James E. and Frances W. Mason within twelve months from the date of the rendition thereof; and thereafter the said Mason and the administrator of the estate of Frances W. Mason separately proceeded in said court by *scire facias* to

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have the decrees revived. In neither of these cases were the complainants made parties. In the proceedings by James W. Mason the Probate Court adjudged and declared that the decree in favor of his guardian had been satisfied, except for the sum of \$33, by a payment made by Buchanan in lands conveyed by him to the common guardian of said minors. That decree was afterwards reversed, on appeal to this court, and the cause remanded, this court directing, as is averred in the bill, that a credit on said decree should have been allowed only for the sum of \$500, as of the date of the rendition of the decree, and that \$500, the balance of the amount allowed by the Probate Court as a credit, should be credited on the decree in favor of the guardian of Frances W. Mason. In the proceedings instituted by the administrator of Frances W. Mason an order was made, reviving the decree for the full amount thereof, principal and interest, less a credit of \$100, as of the date of the decree, and that order was afterwards affirmed on appeal by Buchanan to this court. The bill further avers that the record in that case "did not raise the question of the right or propriety of entering on this decree the said credit of one-half of the \$1,000 paid by Buchanan as aforesaid, nor did said record disclose or show the beneficial interest in the said decree to be the property of the said James E. Mason." After the affirmance, an execution was issued on the decree against Buchanan and returned "no property found," and thereupon an execution was issued against the complainants for the full amount of the decree, principal and interest, without crediting the same with the \$100 to which the Probate Court had declared it was entitled, or with the said sum of \$500, the balance of the payment made by Buchanan to the guardian of James E. and Frances W. Mason in land, after crediting a like sum on James E. Mason's decree. It is also averred that James E. Mason was still prosecuting his proceedings to revive, and was seeking to "disallow to their said principal, Buchanan, the benefit of the said payment of \$1,000" as a credit on the decree, and only to allow him a credit thereon for \$500. The bill prays that an injunction be issued, enjoining James E. Mason and John B. Tally, as the administrator of the estate of Frances W. Mason, deceased, from proceeding further in the enforcement of the decrees rendered by said Probate Court on the settlement made by the said Buchanan as administrator of the estate of Winfield S. Mason, deceased; that said decrees be credited with the amounts paid thereon by Buchanan, as above stated; that an account be taken of the amount of the *devastavit* committed during the joint administration of the said Buchanan and Frances S. Mason on the estate of Winfield S. Mason, and that it be set off against said decrees; and for general relief. An

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injunction was issued in accordance with the prayer of the bill.

The defendants, Tally and Mason, answered the bill under oath, and incorporated into their answer a demurrer, the grounds of which are sufficiently indicated in the opinion; and they also moved to dismiss the bill for want of equity. The cause was submitted for decree on the demurrer, the motion to dismiss, and also on a motion to dissolve the injunction; and on the hearing the chancellor caused a decree to be entered, dissolving the injunction and dismissing the bill. That decree is here assigned as error.

ROBINSON & BROWN, for appellants.

R. C. HUNT and W. H. NORWOOD, *contra*.

SOMERVILLE, J.—It is our judgment that the demurrer to the bill in this case was properly sustained. It was fatally deficient in equity in several particulars.

The complainants had a plain and adequate remedy at law, so far as concerns the items of \$100, and \$500, alleged to have been paid on the judgments rendered against Buchanan.

If these payments were made after the revival of the judgments in the Probate Court on the *sci. fa.* proceedings; or even if they were made before such revivor, and the proposition can be maintained that the neglect of Buchanan to set up the defense of payment does not conclude his sureties, the latter would be entitled to a *supersedeas*, arresting the issue of any execution against them on the judgment or judgments so satisfied, save only for the balance remaining due and unpaid. All courts possess this inherent and necessary power to prevent the abuse of their own process, by quashing executions thus wrongfully and improvidently issued, or by superseding them *pro tanto* so far as paid or satisfied.—*Lockhart v. McElroy*, 4 Ala. 572; *Rutland v. Pippin*, 7 Ala. 469; *Dunlap v. Clements*, 18 Ala. 778. The power of the Probate Court was clearly adequate to allow these credits in favor of Buchanan, had they been legal and proper, and been presented in proper time. *Mason v. Buchanan*, 62 Ala. 110.

The bill is further defective in failing to make the administrator of the estate of Mrs. Frances S. Mason a party defendant to the suit. She was a necessary party, in whose absence no decree can be justly rendered. The purpose of the suit is, in part, to set up against the judgments sought to be enjoined, an *equitable set-off*, amounting to about one thousand dollars, which James E. Mason, the beneficial owner of these judgments, received from the estate of said Mrs. Mason, who was a co-principal with Buchanan on his first administration bond. In

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order to authorize this, if at all permissible, the *insolvency* of Mrs. Mason's estate must have been averred and proved, for otherwise such of the complainants as were her sureties on the first bond could recover at law by way of contribution any sum paid by them to the use of their principal.—*Railroad Company v. Rhodes*, 8 Ala. 206; *Betts v. Gunn*, 31 Ala. 219; *Tate v. Evans*, 54 Ala. 16; 2 Brick. Dig. p. 433, §§ 165 *et seq.*

We can not see, furthermore, that the two Larkins and Compton were proper parties plaintiff in the suit. They were sureties on the second bond given by Buchanan, and this bond was executed after the death of Mrs. Mason. There was no privity therefore between these complainants and Mrs. Mason. Their principal was Buchanan, and none other. Conceding that the other complainants were entitled to recover, in the absence of any proposed amendment to correct this misjoinder, no relief could be granted them in this cause, and the bill was properly dismissed. The general rule in courts of equity is, that all of the parties complainant must be entitled to relief, or the suit must fail.—*James v. James*, 55 Ala. 525; *Vaughn v. Lovejoy*, 34 Ala. 437; *Wilkins v. Judge*, 14 Ala. 135.

The decree of the chancellor will, however, be modified by dismissing the bill *without prejudice*, and, as thus amended, the decree will be affirmed.

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Petition by Administrator for the Sale of Lands for the Payment of Debts.

1. *Homestead exemption in favor of widow and minor children under § 2840 of the Code of 1876.*—The widow and minor children of a decedent who, a resident of this State, died intestate in 1878, owning no homestead, but occupying at the time of his death a rented dwelling, are entitled, under the provisions of section 2840 of the Code of 1876, to a homestead exemption in a lot and storehouse in a town, the only real estate of which the decedent died seized and possessed, and which was worth less than one thousand dollars, although the storehouse had never been occupied as a dwelling.

2. *Same; when estate insolvent, vests absolutely.*—In such case, the estate of the decedent being insolvent, the exemption vests absolutely in the widow and minor children under the provisions of section 2827 of the Code.

APPEAL from Sumter Probate Court.

Tried before Hon. W. R. DeLoach.

The facts are sufficiently stated in the opinion. The proof

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of the insolvency of the estate of James M. Hartsfield, deceased, consisted of an admission of counsel that "said estate is insolvent." It does not appear from the record when the debts, for the payment of which the lot was sought to be sold, were contracted; and no question on that point was made in the Probate Court.

THOS. B. WETMORE, for appellant.—(No brief came to the hands of the reporter.)

WATTS & SONS, with whom were SPROTT & ALTMAN, *contra*. (1) Section 2840 of the Code of 1876 is a part of an act of the legislature approved on 9th February, 1877. Prior to the approval of that act all the lands of a decedent, except the homestead allowed by law prior to that time, were liable to be sold for the payment of debts. It was only the place used as a homestead and occupied as such, that could be held by the widow or minor children of the decedent. All other lands owned by him at the time of his death were liable to the payment of his debts. As to debts contracted prior to the approval of the act of 9th February, 1877, the legislature could not constitutionally enlarge the homestead, or extend it so as to embrace real estate not before that time exempt. In order then to show that the land now sought to be sold for the payment of debts, can be selected as a homestead, it must be shown, that the debts were contracted after the 9th February, 1877. This is not shown by the record. For the purpose of sustaining the decree of the Probate Court, this court will presume that the debts were contracted prior to the 9th February, 1877. (2) Section 2840 of the Code does not seem to contemplate, that a *storehouse*, used for the sale of goods at and before the death of the deceased, could be selected as a homestead, but only such land as might be used as a *dwelling* or *homestead*—land *fit for a homestead for the family*. (3) But if a storehouse could be selected as a homestead under that section of the Code, it would still be liable to be sold for the payment of debts, subject to any right of the widow and children, which could only exist during the life of the widow or the minority of the children.—Code of 1876, § 2821.

STONE, J.—James M. Hartsfield died intestate in 1878, a resident, at the time, of the county of Sumter, State of Alabama. He left surviving him a widow and minor children, and his estate is insolvent. He owned no homestead, but occupied a rented dwelling. At the time of his death he owned a lot and storehouse in the town of Belmont in Sumter county, worth less than one thousand dollars, and he owned no other

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lands. The testimony values the property at about three hundred and fifty dollars. The administrator petitioned for an order to sell the lot and storehouse for the payment of the debts of the estate, and the widow contested the application on the ground that she selected the same for a homestead under the statute. The proof shows no other material facts in the case, except that the said storehouse had never been occupied as a dwelling. On this ground it is contended that the claim of homestead is invalid. We think the case falls directly within the statute; and the estate being insolvent, it vests absolutely in the widow and minor children.—Code of 1876, §§ 2840, 2827. The petition ought to have been dismissed.

Reversed; and proceeding to render the decree the Probate Court should have rendered, it is ordered and decreed that the petition be dismissed at the costs of the petitioner. Let the appellee pay the costs of appeal in the court below and in this court.

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Bill in Equity to Quiet Title to Land.

1. *When proceedings to set apart homestead to widow under § 1738 of the Code of 1852, void.*—Proceedings instituted by the widow of a decedent in the probate court to have set apart to her a homestead exemption under section 1738 of the Code of 1852, no part of which contains any description whatever of the lands sought to be set apart as exempt, but in which blanks are left for such description, are absolutely void.

APPEAL from Jefferson Chancery Court.

Heard before Hon. CHARLES TURNER.

The facts are sufficiently stated in the opinion.

JNO. T. TERRY and M. T. PORTER, for appellant.

HEWITT & WALKER, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The bill in this case is in the nature of a bill *quia timet*, the purpose of which is to quiet the title of a certain tract of land, the fee of which is alleged to be in the appellant, Tanner, who claims by purchase from one Catharine

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Adams, who derived her title through the medium of certain proceedings in the Probate Court of Jefferson county.

These proceedings are set out, as an exhibit to complainant's bill, *in hæc verba*. They originated by petition to the court, which seems to have been filed in May, 1866, by Catharine Adams, praying to have a homestead set apart to her as exempt under the provisions of section 1738 of the Code of 1852, afterwards amended so as to constitute in substance section 2061 of the Revised Code of 1867. The petitioner was averred to be the widow of one Richard Adams, deceased, and the lands were alleged to be under five hundred dollars in value.

These proceedings are full of defects which are utterly fatal to their validity, and render them unquestionably void.

Of these it is only necessary to mention one. There is *no description whatever of the lands* prayed to be allotted as a homestead anywhere throughout the whole proceedings, either in the original petition to the Probate Court, or in the report of the three commissioners who were appointed to lay off and set apart the same, or in the final judgment of the court confirming the report.

The court for this reason, to say nothing of others equally fatal, *had no jurisdiction* of the case, and its judgment is a nullity.—Freeman on Judgments, §§ 117, 123, 264; *Wilburn v. McCalley*, 63 Ala. 436, and cases cited on page 445.

The judgment would also be *void for uncertainty*, owing to the *blank* left in it, which was never filled by inserting a description of the lands. There was no method by which these lands could be legally identified, and a judgment or decree of this character can be regarded as possessing no more legal efficacy than so much waste paper.—Freeman on Judgments, §§ 50–52, 54; *Spence v. Simmons*, 16 Ala. 828; *Gayle v. Singleton*, 1 Stew. 566.

The demurrer was, without doubt, properly sustained, and there was no error in dismissing the bill of appellants.

Affirmed.

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Action on Promissory Note.

1. *Promissory note; when consideration not illegal*.—Where a party, after having taken steps to secure public lands as a homestead under the acts of Congress commencing with section 2289 of the Revised Statutes, and after having made improvements thereon by erecting houses, etc., at

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the end of two years, abandons all intention of securing the lands as a homestead, and executes, on the back of his preliminary certificate, a relinquishment of his claim to the Government, and sells the improvements he had erected thereon to another, delivering to him his certificate with the relinquishment endorsed thereon, and possession of the lands, such a transaction is not a sale of an imperfect pre-emption or homestead right, and a note made by the purchaser for the purchase-money is not tainted with illegality.

2. *Same; when not within the statute of frauds.*—Nor does such a contract in any way offend the statute of frauds.

APPEAL from Cleburne Circuit Court.

Tried before Hon. W. L. WHITLOCK.

This was an action on a promissory note brought by H. Hatfield against H. Tarrance and G. W. Alexander. The defenses relied on in the court below were, in substance, (1) that the note was founded on an illegal consideration, in that it was a sale of an imperfect pre-emption or homestead right, and, therefore, violative of the statutes of the United States; and (2) that the note was void under the statute of frauds. The trial resulted in a verdict and judgment for the plaintiff, and from the judgment the defendants appealed. The facts are sufficiently stated in the opinion.

AIKEN & MARTIN, for appellants, cited *Cothran v. McCoy*, 33 Ala. 65; *Pettit's Adm'r v. Pettit's Distributees*, 32 Ala. 288; *Lindsey v. Veasy*, 62 Ala. 421; Code of 1876, § 2121, Sub. 4.

ELLIS & MARTIN *contra*. (No brief came to the hands of the reporter.)

STONE, J.—The defense attempted in this case misapprehends the nature of the contract declared on. The consideration of the note was not an interest in land, nor was it a sale of a homestead or pre-emption right. Hatfield neither claimed, nor attempted to sell either. Pollard had taken steps to secure the lands as a homestead, under the acts of Congress, commencing with section 2289 of the Revised Statutes. He had made improvements by erecting houses, clearing lands, etc.; and at the end of two years, he abandoned all intention of securing the lands as a homestead, and executed a relinquishment of all claim to acquire title to said lands. This relinquishment was made to the United States, and was indorsed on the preliminary certificate of entry, which he had taken out under section 2290. He sold his improvements to Hussey, turned over the possession to him, and also delivered to him the primary certificate of entry, with the surrender to the Government indorsed thereon. Hussey held possession one year and then sold the improvements to Tarrance, delivered to him the possession, and also sur-

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rendered to him the indorsed certificate of entry he had received from Pollard. He also sold Tarrance some other chattels, which, with the improvements, constitute the consideration of the note sued on. The expressed consideration of the note is "labor received."

The effect of this transaction was, to again expose the lands to entry as a homestead, for that is the effect of a surrender by the homestead occupant to the Government, if made before final proof of occupancy is perfected. But the evidence of that surrender was in the possession, first, of Hussey, and then of Tarrance, so that no one could, within the time allowed for perfecting the entry, have again entered the lands as a homestead. The *prima facie* impress of the transaction is, that both Hussey and Tarrance successively contemplated securing the lands by entry as a homestead, and Tarrance did so secure the three forties, the improvements on, and possession of which he obtained from Hussey. The actual sale, then, was of the improvements—the products of the labor which had been bestowed—and which, whoever became the owner of the freehold, would get the benefit of. That precise thing appellant bargained for, and he does not pretend he failed to obtain it. This contract in no way offended the statute of frauds, nor was it a sale of an imperfect pre-emption or homestead right.—*Scoggin v. Slater*, 22 Ala. 687; *Cassell v. Collins*, 23 Ala. 676. *Pettit v. Pettit*, 32 Ala. 288, and *Lindsey v. Veasy*, 62 Ala. 421, were actual sales of land before the title was perfected, were violations of the express provisions of the acts of Congress, and were, consequently, governed by principles entirely different. We think there was nothing illegal in the consideration shown in this case. All the rulings of the Circuit Court to which exceptions were taken, relate to the subjects discussed above, and the rulings were in accordance with our views.

Affirmed.

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Statutory Real Action in the Nature of Ejectment.

1. *Admissibility of evidence*—Where, in an action of ejectment, the defendant relied on adverse possession by himself and his father, under whom he claimed, as a defense, a letter written by his father to the plaintiff during the time covered by the claim of adverse possession, recognizing in the plaintiff an interest in or control over a lot of land, which the other evidence in the cause pointed to as the lot sued for, al-

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though not described or otherwise indicated in the letter, is competent evidence for the plaintiff, as tending to show that the possession relied on was not adverse.

2. *Same.*—Where, in such case, a witness in his deposition, after testifying that during the time covered by the claim of adverse possession, he occupied a house on the lot in controversy, which he had rented from the defendant's father, further stated that he heard defendant's father say that the lot was the property of some person, whose name he did not remember, and that he, defendant's father, had authority to build the house, and then appropriate half of the rents to his own use for the trouble of building and renting; and in a subsequent part of his testimony he used this language: "I think the name of the party to whom he [defendant's father] said the lot belonged was Alfred Moore," when the plaintiff's name is Frederick B. Moore,—*held*, that the testimony was competent evidence, as tending to rebut the alleged continuity of adverse possession on the part of defendant; and that the fact that the witness improperly designated the alleged owner of the lot as Alfred Moore, went only to the identity of the party named, which was a question of fact for the jury, there being other evidence, from which the jury might justly infer a mere mistake of name or recollection in the matter.

3. *Same.*—As evidence tending to show such identity, the testimony of another witness is competent, which is to the effect that he had resided in the town in which the lot was situated a number of years, and knew of only one family by the name of Moore, who had ever resided in said town; that in this family there were several boys, one of whom was the plaintiff, and that no member of the family was named Alfred.

4. *When charge properly refused.*—A charge which ignores an important feature of the evidence in a cause, and for that reason, is misleading, is properly refused, although it may assert a correct proposition of law.

APPEAL from Talladega Circuit Court.

Tried before Hon. LEROY F. BOX.

This was a statutory real action in the nature of ejectment, brought by Frederick B. Moore against John A. Savery, to recover possession of a certain lot of land in the town of Talladega, and was commenced on 30th January, 1874. The defendant pleaded, in short by consent, (1) not guilty; (2) the statute of limitations of ten years, and (3) the statute of limitations of twenty years; and the cause was tried on issue joined on these pleas. No documentary evidence of title was introduced on the trial by either party, both parties relying on possession, and the defendant claiming under his father, Joseph N. Savery.

The plaintiff examined as a witness one Jackson, who testified that he was in possession of the lot in controversy during the years 1859 and 1860, and "used the same as a store-house; and that he made arrangements with, and rented said lot from plaintiff in Wetumpka, Alabama, who gave witness a letter to Joseph N. Savery, defendant's father, in reference to the matter; that the letter was sealed, and witness did not know what it contained, but when he gave the letter to Joseph N. Savery in Talladega, he said it was all right, and immediately put witness in possession of the lot," where he remained about two

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years, and paid rent to plaintiff; that during that time Joseph N. Savery never demanded the rents of witness, and that when he left, he turned the key over to Joseph N. Savery. The plaintiff read in evidence the deposition of one Mitchell, who testified, in substance, that during the year 1857, he was a member of a firm engaged in the carriage business in Talladega, who occupied a new building which had been built on the lot in controversy by Joseph N. Savery, from whom they rented. He further testified that he heard said Savery say that the lot was the property of some person, whose name witness did not remember, and that "he had authority to build the house, and then appropriate half of the rents to his own use for the trouble of building and renting." To this declaration by Savery the defendant objected, but his objection was overruled, and he excepted. In the witness' answer to a succeeding interrogatory, he said: "I think the name of the party to whom he [Savery] said the lot belonged, was Alfred Moore." To this answer the defendant objected, but his objection was overruled, and he excepted. The plaintiff also examined as a witness one Riley, who testified, in substance, that he had resided in Talladega a number of years, and that he knew of only one family by the name of Moore, who had ever resided in said town, that in this family there were several boys, one of whom was the plaintiff, and that no member of the family was named Alfred. To the testimony of this witness the defendant objected, but his objection was overruled and he excepted. The plaintiff also proved and read in evidence a letter bearing date, December 2d, 1866, written by Joseph N. Savery to the plaintiff, which was as follows: "Myself and your father have been trading about a lot, and I have commenced building on it, and one Thomas W. Sullivan has been kicking up lots of fuss about it. I want you not to make any arrangement about it with him. Now, as he will write you to-night, I expect, be careful how you talk to him about it. So no more." To the introduction of this letter the defendant objected on the ground, among others, that it was not shown to have any reference to the lot in controversy in this suit; but the court overruled his objection, and he excepted. The testimony of the witnesses for the defendant tended to show that the defendant and his father, Joseph N. Savery, had been in the open, adverse and continuous possession of the lot sued for since the year 1850, they, during such possession, claiming title to, and exercising acts of ownership over, said lot.

The court, at the request of the plaintiff in writing, gave three charges to the jury, the substance of which is given in the opinion. To the giving of each of these charges the defendant duly excepted. The defendant requested the court in

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writing to charge the jury, in substance, that when the statute of limitations begins to run in favor of a party, it continues to run from such date; and that if they believed from the evidence that the statute commenced to run in defendant's favor in 1850, the war did not stop it, but that the period covered thereby would merely have to be deducted in making the estimate of time. This charge the court refused to give, and the defendant excepted.

A judgment was rendered in favor of the plaintiff on verdict, from which the defendant appealed; and the rulings above noted he here assigns as error.

BOWDEN & KNOX and BRADFORD & BISHOP, for appellant.

PARSONS & PARSONS, *contra*.

SOMERVILLE, J.—We find no error in the record. The letter from J. N. Savery, the father of defendant, written to the plaintiff, Moore, was properly admitted in evidence. In connection with the other testimony in the cause, it tended to show that the plaintiff had some sort of interest in, or control over the lot in controversy, at some time prior or up to its date, which was December 2, 1866. It was also competent to rebut the alleged continuity of adverse possession on the part of the defendant.

So likewise with the testimony of the witness Mitchell, which was clearly competent for the same purpose. The fact that he improperly designated the alleged owner of the lot as *Alfred* Moore went only to the identity of the party named, which was a question of fact for the jury. There was other evidence from which the jury might justly infer a mere mistake of name or recollection in the matter. The testimony of the witness Riley was also pertinent to establish this identity, alleging that there was but one family by the name of Moore resident in the community about that time, which was the family of plaintiff's father.

Mitchell's assertion embodying the expression, "I *think* the name of the party, to whom he [Savery] said the lot belonged, was Alfred Moore," was not the averment of a mere opinion. It was manifestly intended as an averment of his best recollection, especially when taken in connection with the antecedent declaration disclaiming any positive recollection about the matter. It is often so used in common parlance.

The several charges given by the court were free from error. They merely asserted in effect the well settled principles, that the possession of the tenant is that of the landlord, and that every tenant is estopped from denying his landlord's title, until

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he first yields possession of the rented premises; and that the statute of limitations would not commence to run, under the facts of this case, until there was an adverse possession on the defendant's part, asserted openly, notoriously and continuously. There was evidence from which the jury could have inferred the relation of landlord and tenant, and the charges were otherwise supported by the evidence.

The charge requested by the defendant may have asserted a correct proposition of law, but it was properly refused, because it ignored one important feature of the testimony in the cause, and was for this reason misleading. It excluded from the consideration of the jury, entirely, the testimony of the witness Mitchell and others, tending to show a tenancy on the part of Savery, and a recognition by him of a title in the plaintiff.

Affirmed.

Robinson v. Pebworth.

Bill in Equity pursuing Trust Funds invested in Land, and to have the Land sold for Payment thereof.

1. *Devastavit by guardian; trustee in invitum.*—Where a guardian, having purchased a lot of land, partly for cash, and partly on credit, used his ward's money in making the cash payment, taking the title in his own name, and securing the unpaid purchase-money by mortgage on the lot,—*held*, that in thus using the ward's money, he committed a *devastavit*; and that his vendor, having received the money with a knowledge of its trust character, thereby became a trustee *in invitum*.

2. *When husband acts as agent for his wife.*—The deed to the guardian having been executed by husband and wife, the latter being a free dealer, in usual form, and the mortgage taken in the name of the husband, reciting the debt as due to him, while the land belonged to the wife, but the fact of her ownership does not appear on the face of the papers, nor was otherwise made known,—*held* that the husband, in making the sale, acted as the agent of his wife, and that she ratified the agency by joining in the execution of the deed.

3. *When notice to the husband is notice to the wife.*—In such case, after a sale of the lot under a power contained in the mortgage, at which it was bid off by, and conveyed to a third party, who acted merely for the wife, and who subsequently executed a conveyance to her, and after a recovery of the lot by the wife in an action of ejectment, on bill filed by the ward, seeking to subject the lot to sale for the payment of the money which was paid to the husband by the guardian, it was further held that notice to the husband was notice to the wife, and that she could claim no higher rights, or greater exemptions, than her husband could have claimed, if the lot had been his property.

4. *When party not a bona fide purchaser.*—The lot having been the property of the wife, and the debt for the unpaid purchase-money, though

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payable on its face to the husband, having been in fact due to her, when she, through another, made the purchase, she simply bought mortgaged property in payment of her debt; and hence, being charged with notice of the ward's prior equity, she did not thereby become a *bona fide* purchaser.

5. *Same.*—But if the lot had been the property of the husband, and the purchase-money secured by the mortgage had been due to him, the testimony in reference to the consideration of the wife's purchase, merely showing that it was a "large amount" which the husband owed her, is wholly insufficient to establish a valuable consideration parted with by her, or even to establish a *bona fide* indebtedness from the husband to her, so as to affect the rights of creditors, or third parties.

6. *When plea of res adjudicata not sustained by the proof.*—The testimony introduced in support of a plea of *res adjudicata*, interposed as a defense to the bill in this case, is held to be "entirely too meagre to show that the same matters were in issue, and a final decree pronounced on their sufficiency as a ground of relief."

7. *When ward not estopped from pursuing funds invested by the guardian, by proceedings on final settlement of the guardianship.*—Where a guardian, having purchased a lot of land, partly for cash, and partly on a credit, used his ward's funds in making the cash payment, taking the title in his own name, and securing the unpaid purchase-money by mortgage on the lot, which was afterwards foreclosed under a power of sale contained therein, and purchased by one charged with notice of the trust character of the funds used in making the cash payment, the fact that the guardian on final settlement of his guardianship did not receive a credit for the funds so used, but a decree was rendered therefor against him and his sureties, which had not been satisfied, does not estop the ward from pursuing the funds into the lot in which they were invested, and from subjecting the lot to sale for the payment thereof.

8. *Same; estoppel a reasonable doctrine.*—"Estoppel in such cases is a reasonable doctrine, and simply means that you shall not take the fruits of an illegal transaction, and afterwards set the transaction aside as illegal—in other words, that you shall not be heard to claim both under and against the same title."

APPEAL from Montgomery Chancery Court.

Heard before Hon. JNO. A. FOSTER.

In 1871, \$1,400 was paid into the Probate Court of Montgomery county, belonging to Samuel M., William D., Thomas H. and Mary F. Pebworth, who were then minors, without guardian. Afterwards, in May, 1871, Mrs. Frances A. Pebworth, the mother of said minors, was appointed their guardian by said court, and, after qualifying as such by executing bonds with Patrick Robinson and Robert H. Knox as her sureties thereon, she was paid said money. Mrs. Pebworth and Knox were then insolvent, and have since continued to be so. On 20th May, 1871, Mrs. Pebworth purchased from Patrick Robinson an improved lot in the city of Montgomery for \$1,500, and he and his wife, Margaret Robinson, executed to her a deed thereto. This deed was made to "Frances A. Pebworth, guardian" of said minors, naming them. Of the purchase-money \$1,200 was paid in cash by Mrs. Pebworth to Mr. Robinson, and for the balance she made her note, payable to him twelve months after date, with interest. To secure this note she also, on the

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same day, executed to him a mortgage on the lot which she had purchased, with a power of sale. In this mortgage, in the granting clause, she styles herself guardian of said minors, and it is recited therein that she executed the same "by virtue of an order this day granted me to this effect by the Probate Court." The substance or purport of this order is not further stated in the mortgage, nor is it set out in the record. In fact, this lot was at the time of these transactions the property of Mrs. Robinson, it having been conveyed to her in 1854, by one Samuel Murrell; but the fact of her ownership does not appear either from the deed or mortgage above mentioned. In May, 1877, the mortgage was foreclosed by a sale under the power contained therein, and at the sale a third party bid in the property for an amount sufficient to pay the mortgage debt and expenses of sale; received a conveyance of the lot executed by Robinson, and afterwards executed a deed conveying the lot to Mrs. Robinson. Afterwards Mrs. Robinson commenced a suit in ejectment against Mrs. Pebworth for the possession of the lot, and in 1878, recovered a judgment therefor, no defense having been made to the suit. Under a writ issued on this judgment Mrs. Robinson was put into possession of the lot, and she was in possession thereof when this suit was commenced.

The bill in this cause was filed on 6th February, 1879, by the above named wards, two of whom had attained their majority, against Patrick Robinson and his wife, Mrs. Pebworth, and the purchaser at the mortgage sale, in which it is charged that Robinson fraudulently colluded with Mrs. Pebworth to obtain possession of their money; that the latter was appointed their guardian in pursuance of an agreement between Robinson and Mrs. Pebworth to the effect, that if she would agree to purchase said lot from him with complainants' money, at the price for, and on the terms at which, it was purchased, as above stated, he would become her bondsman as guardian of complainants; that in further pursuance of the agreement, the purchase was made, the money paid, and the deed and mortgage executed; that the price paid for the lot was greatly in excess of its true value; and that the purchaser at the mortgage sale, while ostensibly buying the lot for himself, in fact bid it in for Mrs. Robinson. The prayer of the bill is for an account, for a lien on the lot, for a sale thereof for the payment of what may be ascertained to be due the complainants, growing out of their guardian's *devastavit*, and for general relief. The bill waived answers under oath by all the defendants except Mrs. Pebworth, who was required to answer under oath.

Mrs. Pebworth answered under oath admitting substantially the agreement between herself and Robinson, as set up in the bill, but denying any intentional fraud on her part. The other

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defendants filed a "joint and separate" answer, denying the alleged agreement and the fraud charged in the bill, and that Robinson had in any way procured Mrs. Pebworth's appointment as guardian of complainants; and averring that the sale of the lot and the other transactions connected with the lot following the sale, were had and made in good faith, and that the lot was worth the price at which Mrs. Pebworth bought it. Other defenses are set up in their answer, which are sufficiently indicated in the opinion.

Touching the plea of *res adjudicata* incorporated in the joint answer of Robinson and others, mentioned in the opinion, the evidence introduced at the hearing showed that in 1873, the exact time not stated, the complainants in the bill in this cause, all of whom were then minors, suing by their next friend, filed a bill in said court against Patrick Robinson and Mrs. Pebworth; and that the bill and all the other papers belonging to the file in that cause had been lost or mislaid. It was shown by sworn copies of the docket and minute entries in that cause, that Mrs. Pebworth answered the bill on 4th December, 1873, and on the 8th of that month Patrick Robinson demurred to the bill; that on 24th January, 1874, a decree was entered sustaining Robinson's demurrer, and allowing forty days within which to amend, and that at the November term, 1875, the cause was dismissed at the costs of the complainants' next friend. The only proof offered of the purpose and contents of the bill, and of the other pleadings in the cause, was the testimony of Patrick Robinson, who, after showing the filing of the bill and his demurrer thereto, and the identity of the parties, testified as follows: "I had advertised said real estate for sale under said mortgage, and complainants, by their next friend, Daniel H. Workman, filed said bill against me to restrain the sale of said realty under the mortgage. The bill alleged substantially that the money with which the property was bought belonged to the minor heirs, and that said Frances A. Pebworth, in order to induce me to become surety on her official bond as guardian, agreed to invest \$1,200 of their said money in said realty, and that it was in consideration of said agreement that I became her surety. The bill alleged collusion and fraud between me and Frances A. Pebworth, and made her a party defendant to said bill. Mrs. Pebworth answered the bill, but I, through my attorney, demurred, but I do not know upon what grounds. The demurrer was sustained and the bill dismissed. This is, according to my best recollection, the substance of the subject-matter of said suit, and the same matters are involved in this suit. The same relief was prayed in both cases."

It was, by written agreement of the parties, admitted that Mrs. Pebworth made final settlements of her guardianships of com-

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plainants in the Probate Court on 28th February, 1874, and thereon decrees were rendered against her in favor of each of her wards for \$323.16; that on said settlements no credit was allowed her "for the money alleged to have been invested in the land in controversy;" that the complainants and the guardian *ad litem* who represented them on said settlements, "had full knowledge of said purchase of the land in controversy, and of the manner and means of said purchase;" that decrees were also duly rendered for said amounts against Robert H. Knox, and Patrick Robinson, as her sureties, but no executions had issued either against the guardian or her sureties; and that said decrees still remained of full force, and were unsatisfied. The other facts necessary to an understanding of the opinion are sufficiently stated therein.

On the hearing, had on pleadings and proof, the chancellor, being of opinion that the complainants were entitled to relief, entered a decree of reference as to the amount due them; and, at a subsequent day of the same term, on the report of the register, ascertaining that "the amount, including principal and interest to date, of the funds in the hands of the defendant, Frances A. Pebworth, which belonged to the complainants, in this cause, and which she paid to the defendant, Patrick Robinson, on the purchase of the lands mentioned in this case, is \$2,153.86," a decree was entered, ordering a sale of the lot for the payment of said amount.

The above mentioned decrees are here assigned as error.

RICE & WILEY, for appellants.

JNO. GINDRAT WINTER and GUNTER & BLAKEY, *contra*.

STONE, J.—The testimony as to whose money—\$1,200—was employed in making the first or cash payment in the purchase of the lot, all points in one direction, and shows conclusively that it was the money of the complainants, all of whom were then minors, some of very tender years. So, we have no difficulty in reaching the conclusion that the chancellor found, and rightfully found, that fact in favor of complainants.

The next inquiry is, did Robinson, when he received the money, know it was the property of complainants. Frances A. Pebworth, from whom Robinson received the money, mother of complainants, was then their guardian, and Robinson was one of her sureties. The testimony on this question is not entirely in harmony, but we think the weight of it is decidedly in favor of the proposition, that in negotiating and effecting the sale of the lot, Robinson was informed and knew that the money of the wards was to be used in making the cash payment.

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There is a preponderance of the oral testimony on that side; and if such was not the understanding, why was the deed made to Mrs. Pebworth, styling her guardian, and why did she sign the mortgage in the same way? The mortgage on its face shows that it was given "by virtue of an order this day granted me to this effect by the Probate Court." Guardians, it is true, may invest the money of their wards in real estate; but the title must be taken in the name of the ward.—Code, §§ 2788–9. And under certain conditions, the Probate Court may direct the sale of the ward's property for re-investment.—*Id.* 2785. There is nothing to show this purchase was made under either of these provisions; and the title was made, not to the wards, but to Mrs. Pebworth. The Probate Court had no power to authorize the guardian to give a mortgage. Why should this clause have been inserted in the mortgage, if Mrs. Pebworth was purchasing in her own right, and with her own money? In his testimony Mr. Robinson says: "All I can recollect in reference to the order of the Probate Court referred to in said mortgage is, that I was unwilling to sell said realty unless I was protected in the sale thereof. . . . She said that she wanted to invest the money for the benefit of the heirs—the particulars of the conversation, however, I can not recollect. She said she would get an order of the Probate Court to protect me fully." We may again ask, why all this, if Mrs. Pebworth was not dealing—confessedly dealing—with trust funds? We can not doubt that when Mr. Robinson negotiated and concluded the terms of the sale, he had notice and knowledge that the moneys of the complainant-wards were to be, and were used in the purchase.

In thus using the trust funds confided to her, Mrs. Pebworth committed a *devastavit*; and when Robinson received it, knowing its trust character, he constituted himself a trustee *in invitum* of that fund.—*Lee v. Lee*, 67 Ala. 406.

The lot in controversy was originally the property of Mrs. Robinson. The title deed is in evidence, and it shows that the title was in her. The testimony is that she was a free dealer. But there is nothing in the proof of the negotiation, nor in the title papers executed, which tends to show the lot was sold as the property of Mrs. Robinson. Neither the deed nor mortgage mentions who is the owner. The deed is in usual form by husband and wife, and the mortgage, reciting a debt to Patrick Robinson, conveys the lot back to him, to secure its payment. But we need not consider the effect of this. The most that can be made of it is, that, in making the sale, Robinson acted as the agent of his wife. She ratified the agency, by joining in the execution of the deed to Mrs. Pebworth. The testimony fails to show any other act of hers, or any word spoken by her, throughout not only the sale, but the foreclosure pro-

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ceedings and conveyances, afterwards had and performed. In such case notice to the agent is notice to the principal; and Mrs. Robinson can claim no higher rights or greater exemptions, than her husband could claim, if the sale had been made by him of his own property.— *White v. King*, 53 Ala. 162; *Le Neve v. LeNeve*, 3 Atk. 646; *Clark v. Fuller*, 39 Conn. 238; *Wade on Notice*, §679; *Bank of Milford v. Town of Milford*, 36 Conn. 93; *The Distilled Spirits*, 11 Wall. 356.

It is claimed, in the next place, that when Mrs. Robinson purchased at the foreclosure sale, she was a *bona fide* purchaser without notice, and, therefore, she acquired a good title, notwithstanding any equity the complainants may have had; it not being shown she had actual notice of such equity. There are several answers to this argument. In the first place, the lot had been her property, and the debt for the unpaid purchase-money, although on its face payable to her husband, was in fact due to her. When she, through another, made the purchase, she simply bought mortgaged property, in payment of a debt due to her. She parted with no new consideration, for she neither paid, nor ought to have paid any thing on her purchase. Such purchase would give Robinson no right to claim a credit on any debt he might owe to Mrs. Robinson, for the purchase-money was not due to him, but to her. A mortgagee, charged with notice of a prior equity, can not become a *bona fide* purchaser, by buying the mortgaged property at a foreclosure sale made for his benefit.

But if the purchase-money had been due to Patrick Robinson, the testimony in this case is insufficient to establish Mrs. Robinson's claim of *bona fide* purchase without notice. In *Loeb v. Peters*, 63 Ala. 243, the consideration of the purchase was a credit for the amount on a pre existing indebtedness from the seller to the buyer, by account. We held that to constitute a purchase, so as, in the absence of notice, to cut off equities, something valuable must be parted with, or some fixed liability incurred; something advanced, given up, or lost on the part of the transferee. We held the defense in that case insufficient.

The only evidence bearing on this question in this case is that of Patrick Robinson, as follows: "I sold the property at mortgage sale to ——— for about \$450. He acted for Mrs. Margaret Robinson, my wife, to whom he conveyed said property. I owed my wife a large amount, and this was the consideration I received for said deed to ———, and of the deed from ——— to Mrs. Robinson. There was no money or checks used." This is wholly insufficient to establish a valuable consideration parted with, or even to establish a *bona fide* indebtedness from Mr. Robinson to his wife, so as to affect the

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rights of creditors, or third parties.—*Hubbard v. Allen*, 59 Ala. 283.

There is a plea of *res adjudicata* interposed as a defense in this case. The testimony is entirely too meagre to show that the same matters were in issue, and a final decree pronounced on their sufficiency as a ground of relief.—*Shorter v. Sheppard*, 33 Ala. 648; *Smith v. Wert*, 64 Ala. 34; *McBryde v. Rhodes*, 69 Ala. 133.

The defendant, by an amendment to the answer, sought to obtain a recoupment for the value of the rents of the lot, while it was occupied by Mrs. Pebworth. It is a sufficient answer to this, that the record contains no testimony whatever of the value of the rents, and, on the reference before the register, the defendants offered no testimony on any question. And the record shows no exceptions filed to the report of the register. This question is not raised by any ruling of the court below.

It is contended for appellant—defendant below—that by electing to charge, and charging Mrs. Pebworth, the guardian, with the entire sum of money received by her as guardian, the complainants must be held to have abandoned the right to pursue the money into the lot in which it was invested. It should be borne in mind, that in this case Robinson, and through him his principal, Mrs. Robinson, if she received the money, stand charged *in invitum* with the duty of accounting for the trust fund. Fixing a liability on the true guardian, Mrs. Pebworth, was a condition precedent to the right to trace that fund into property it may have been invested in; for, if Mrs. Pebworth committed no *devastavit*, then no one can be charged as a trustee *in invitum*. The effect of the ascertained facts in this case is, to fix a liability alike on the legal guardian, and on any other who received the money, charged with notice of its trust character and misuse; and the pursuit of it against one, before satisfaction is obtained, opposes no obstacle to its prosecution against another, or against property, liable for its payment. *Thames v. Herbert*, 61 Ala. 340; *Lee v. Lee*, 67 Ala. 406. Estoppel in such cases is a reasonable doctrine, and simply means that you shall not take the fruits of an illegal transaction, and afterwards set the transaction aside as illegal. In other words, that you shall not be heard to claim both under and against the same title.—*Butler v. O'Brien*, 5 Ala. 316; *Morris v. Hall*, 41 Ala. 510; *McReynolds v. Jones*, 30 Ala. 101.

If there is any implication in the case of *White v. Cozart* (not reported), which opposes the views above, it was unnecessary and is unsound. That case went off on the authority of *Preston v. McMillan*, 58 Ala. 84.

Affirmed.

Eureka Company v. Edwards.

Bill in Equity to Cancel Deed executed by Minors, as a Cloud upon Complainant's Title.

1. *Rule as to review of chancellor's findings on facts.*—The rule established in this court in reviewing the findings of the court of chancery on facts, is to affirm, unless clearly convinced of error; but if so convinced, to reverse.

2. *Declarations by grantor in deed, made after its execution; when inadmissible.*—Declarations by a grantor in a deed to land, conveying an absolute title in fee simple, made after the deed was executed, as to what his intentions were in its execution, are inadmissible to establish a trust in favor of third parties, inconsistent with the terms of the deed, or to otherwise vary, affect or impair the rights of the grantee under it.

3. *Deed by infant; what necessary to a ratification.*—To constitute a binding ratification of a deed to lands executed by an infant, after he becomes of age, there must be some positive act, knowingly done, affirming the conveyance, or which is inconsistent with the right to repudiate it; mere inaction, unless for a time sufficient to perfect a bar, is insufficient.

4. *Executory contracts of infants; may be avoided without tendering back what was received under the contract.*—If an infant, on becoming of age, disaffirms an executory contract, the adult purchaser or contractor being then forced to become the actor, to have the contract performed, the *quondam* infant is under no conditions or limitations in asserting the invalidity of the contract; the contract being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by the proof, will prevail, without his tendering back anything he may have acquired or received under the contract.

5. *Executed contracts of infants; when tender essential to relief in equity.*—But if the contract, as in this case, is executed, the rule in equity is different. Then the *quondam* infant, or any one asserting claim in his right, must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be decreed him; and hence, if the money or other valuable thing received by the infant be still *in esse*, and in the possession of the infant or of the party seeking relief in his right, a bill seeking to avoid the contract need not tender, or offer to produce or pay, as the case may be.

6. *Same; when tender not required.*—Where, however, as in this case, the infant executed a deed to lands sold by him, and received and consumed the purchase-money during his infancy, a bill averring this fact, filed by one claiming the land under a deed executed by the infant, after he had attained his majority, to have the first deed cancelled as a cloud upon his title, need not tender back the purchase-money received by the infant.

7. *First point decided in Martin v. Martin, 35 Ala. 560, held unsound.* The first principle decided in *Martin v. Martin*, 35 Ala. 560, is not supported by the authorities cited, or by principle.

8. *Adverse possession; what necessary to avoid deed to land.*—To avoid a deed to land on the ground that the land was in the adverse possession of another at the time the deed was executed, there must be an actual adverse holding under claim of right.

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9. *When notice of deed of infant, which he had disaffirmed, by a purchaser from infant after he attained his majority, immaterial.*—Where an infant, for a valuable consideration, which he received and used during his minority, executed a deed to lands, and disaffirmed it, and sold and conveyed the lands to another, after he became of age, the disaffirmance of the first deed destroyed all the claim, both legal and equitable, vested in the grantee thereunder, and left in him no pretense of any equity to assert against the later purchaser; and hence, the fact that such purchaser had notice of the first deed was immaterial.

10. *When notice material.*—It is only when there is a prior right, legal or equitable, that notice, actual or constructive, becomes material to intercept or dominate an after acquired title.

APPEAL from Tuscaloosa Chancery Court.

Heard before Hon. THOMAS COBBS.

On 12th May, 1860, Jesse B. W. Burgin, being then seized and possessed of the north-east quarter of section 31, township 20, range 5 west, sold and conveyed the same to his mother, Mary T. Burgin; and on 26th May, 1863, Mary T. Burgin, by deed with covenants of warranty, conveyed this land in fee simple to Ann Judson Burgin, and Joseph Burgin, the youngest children of Jesse B. W. and Mary Burgin, his wife, said grantees then being minors of tender years. This deed recites a consideration of \$800, but was in fact voluntary. On 12th June, 1869, a deed was executed by Mary Burgin, widow of Jesse B. W. Burgin, then deceased, Joseph Burgin, Ann Judson Thrasher, formerly Ann Judson Burgin, and her husband, and the other children and heirs at law of Jesse B. W. Burgin, deceased, to Giles Edwards and others, conveying certain mineral rights in said land. The bill in this cause was filed on 8th March, 1879, by the Eureka Company, a body corporate, against Giles Edwards and the other grantees in the deed of June 12, 1869, and others, claiming title to said land under the said Joseph Burgin and Ann Judson Thrasher, by deeds executed after the execution of the deed of June 12, 1869; charging that at the time of the execution of said deed the said Joseph Burgin and Ann Judson Thrasher were seized and possessed of said lands in their own exclusive right; that they were then minors, and that, shortly after they attained their majority, they refused to ratify or confirm the deed, but that, in fact, they then disaffirmed and disavowed it; and praying that the deed be cancelled as a cloud upon complainant's title. This title is as follows: (1) Deed from Ann Judson Thrasher and her husband to L. V. McDougal, dated 26th April, 1872, conveying an undivided one-half interest in said land, but excepting the iron ore therein, the principal part of the minerals conveyed by deed of 12th June, 1869; (2) deed from Ann Judson Thrasher (in which her husband did not join) to Robert McDougal, dated 16th September, 1873, conveying an undi-

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vided one-half interest in all the iron ore in said land; (3) deed from Robert and L. V. McDougal to John Salmons, dated 30th March, 1874, conveying the west half of said quarter section; (4) deed from Joseph Burgin and wife to John Salmons, dated 28th March, 1874, conveying the east half of said quarter section; (5) deed from John Salmons and wife to the Eureka Company, dated 1st November, 1876, conveying the whole of said quarter section; (6) deed from Ann Judson Thrasher and her husband to the Eureka Company, dated 15th March, 1877, conveying said land. This deed was made, as shown by its recitals, to correct the defective execution of the deed to Robert McDougal, of date 16th September, 1873, and for an additional moneyed consideration. (7) Deed from Joseph C. Burgin and wife, and Robert McDougal and L. V. McDougal, his wife, to the Eureka Company, dated 25th September, 1879, conveying said land. This deed was executed, as shown by its recitals, to cure defect in complainant's title, growing out of the fact that the former deeds executed by said grantors conveyed designated parts of said land, instead of their undivided half interests therein; the conveyances having been thus executed on account of a parol partition between Burgin and McDougal, made prior to the execution of their respective deeds to Salmons.

Giles Edwards and his associates answered the bill, averring that the deed from Mary T. Burgin to Joseph Burgin and Ann Judson Thrasher, was in fact executed to them in trust and for the benefit of all the children of her son, Jesse B. W. Burgin, and that for this reason all of said children joined in the execution of the deed of June 12th, 1869; that the said Joseph and Ann Judson were of full age when they executed said deed; and insisting on the validity of their deed, and its priority over any rights the complainant may have in the minerals conveyed to them thereby. Said defendants asked that their answer be taken and considered as a cross-bill, thereby praying, *inter alia*, that the complainant be perpetually enjoined from setting up any claim to the minerals in and upon said land, and from interfering with, or hindering them from the full and complete enjoyment of their mineral rights therein.

It was not controverted that McDougal, Salmons and the complainant, at the dates of their respective purchases, had notice of the existence of the deed to Edwards and his associates, of date June 12, 1869. The record contains no evidence showing that Joseph Burgin and Ann Judson Thrasher ratified the said sale and conveyance to Edwards and his associates after they attained their majority; but the evidence shows that in 1873 they, through their attorney, notified Giles Edwards by letter that they were minors when they executed

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the deed, and, in substance, that they did not consider it binding on them, and would not ratify it. Other acts tending to show a disaffirmance of the deed by them were also proved, which need not be stated in this report. The deed from Mary T. Burgin to Joseph and Ann Judson Burgin contains no trust in favor of the other children of Jesse B. W. Burgin; and the evidence offered tending to show that the deed was intended for the benefit of said other children, was mainly declarations made by Mary T. Burgin that such was her intention in executing the deed. The other facts disclosed by the record are sufficiently stated in the opinion.

On the hearing, had on pleadings and proof, the chancellor caused a decree to be entered, denying relief to the complainant, and granting the injunction prayed by Giles Edwards and his associates in their cross-bill. That decree is made the basis of the assignments of error in this court.

A. C. HARGROVE and WATTS & SONS, for appellant.—(1) The rule now established in this court is, that the decision of a chancellor *on facts* is to be treated just like his decision on questions of law. If manifest error is shown, a reversal will follow.—*Rather v. Young's Adm'r*, 56 Ala. 94. (2) The parol evidence introduced to vary the terms of the deed from Mary T. Burgin to Joseph and Ann Judson Burgin, and to establish a trust inconsistent with the express language of the deed, was inadmissible. No trust has been proved in this case that can be enforced.—*Patton v. Beecher*, 62 Ala. 579. *Barrell v. Hanrick*, 42 Ala. 60, criticised and distinguished from this case. (3) The validity of the deed of June 12th, 1869, does not depend upon the question, whether Edwards *knew* or *did not know* that said Joseph and Ann Judson were minors when they executed the deed, but upon the question, whether, *in fact*, they were then of age or not. That Ann Judson was then married, did not enlarge her power to contract or convey; and the deed, as to her, was as invalid as if she had not been married. *Greenwood v. Coleman*, 34 Ala. 150. (4) On the question whether the said Joseph and Ann Judson were estopped from avoiding the deed by anything said or done by them, the following authorities were cited and discussed: *Gillespie v. Nabors*, 59 Ala. p. 445; Tyler on Inf. and Cov. p. 96, § 54; 1 Story's Eq. Jur. § 396; *Devereux v. Burgwyn*, 5 Ired. Eq. 351; *Manning v. Johnson*, 26 Ala. 446; *Brown v. McCune*, 5 Sandf. 224; *Clark v. Goddard*, 39 Ala. 164; *Wilson v. Judge*, 18 Ala. 757; *Slaughter v. Cunningham*, 24 Ala. 260. (5) The deed of June 12th, 1869, was disaffirmed by the said Joseph and Ann Judson after they became of age; and it then became inoperative.—*Slaughter v. Cun-*

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ningham, 24 Ala. 260; *Walker v. Ellis*, 12 Ill. 470; *Dixon v. Merritt*, 21 Minn. 196; *Chapin v. Shafer*, 49 N. Y. 407; Tyler on Inf. and Cov. pp. 84-5, § 44; *Ib.* p. 96, § 54; *Prout v. Wiley*, 28 Mich. 164; *Tucker v. Moorehead*, 10 Peters, 58; *Irvine v. Irvine*, 9 Wall 617; 7 Wait's Ac. and Def. p. 144; *Green v. Green*, 69 N. Y. 553; 56 Mo. 202; 23 Me. 517; *Derrick v. Kennedy*, 4 Port. 41. (6) It was not necessary for them, in order to obtain relief, to restore the purchase-money, after they became of age, they having spent that portion thereof which was paid to them before they arrived at their majority.—*Walsh v. Young*, 110 Mass. 396; *Chandler v. Simmons*, 97 Mass. 508; *Bartlett v. Drake*, 100 Mass. 174; *Dill v. Bowen*, 54 Ind. 205; *Green v. Green*, 69 N. Y. 553; *Mustard v. Wohlford*, 15 Gratt. 329; *Bedinger v. Wharton*, 27 Gratt. 857; *N. H. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Price v. Furman*, 27 Vt. 268. (7) Nor does it make any difference that Salmons or the Eureka Company knew of the sale to Edwards before they bought. The information they received, showed that the said Joseph and Ann Judson were both under age at the time of the execution of the deed to Edwards and his associates; and that, therefore, they had the right to repudiate the contract. The company stand in their shoes, and can assert any rights they could have asserted. *Mustard v. Wohlford*, 15 Gratt. 329. (8) The bill shows that the complainant had the legal title and a complete equity, and is in possession. This is sufficient to entitle it to relief. *Bibb v. Bishop Cobbs Orphans Home*, 61 Ala. 326; *Stewart v. Daniel*, 55 Ala. 278; *Plant v. Barclay*, 56 Ala. 561.

J. M. MARTIN, *contra*.—(1) The burden of proving that Joseph Burgin and Ann J. Thrasher were minors on 12th June, 1869, was upon the appellant; and the chancellor, after considering all the evidence, has affirmed that it does not produce that rational conviction of the fact of their minority, "which the law denominates proof." "It is not enough that the court can not see that the judgment of the primary court was right; unless shown to be wrong, the presumption of correctness arises." *Marlowe v. Benagh*, 52 Ala. 112. (2) Appellees deny that the minority of the said Joseph and Ann Judson at the time of executing the deed of June 12th 1869, if proven, would entitle the appellant to relief, because the sale of the "mineral rights" to appellees, Edwards and his associates, was effected by means of fraud and fraudulent concealments on the part of the said Joseph and Ann Judson; of which the appellant was fully informed before making his pretended purchase. After a discussion of the testimony, the following authorities were cited and discussed on this point:

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Wright v. Snowe, 2 De Gex & Small's Rep. 320; *Conroe v. Bird-sall*, 1 Johnson's Cases, 127; Story on Sales, § 28; Fon.'s Equity, B. I. C. III. § 4; *Ex parte Watson*, 16 Ves. 265; 2 Eq. Cases Abr. 428; 13 Vin. Abr. 536; 9 Vin. Abr. 415; 2 Ves. Sr. 198; 2 Mad. 40; 3 Hare, 503; *Ex parte Unity Joint Stock M. B. Association*, 3 De Gex and Jones, 63; 1 Story's Eq. Jur. § 240; Kerr on Fraud and Mistake, p. 148; 3 Kent's Com. 353, and note 1; 1 Pars. on Cont. 318, and note; Bispham's Eq. § 293; *Ib.* § 294. (3) If said grantors were minors, their deed is not void, but voidable.—*Manning v. Johnson*, 26 Ala. 451. It operated to transmit the title to the property to these appellees.—*Irvine v. Irvine*, 9 Wall. 617. Until their deed is avoided, these appellees have the title; and if the pretended minors have, since their majority, ratified their act, this title is now perfect.—*Irvine v. Irvine*, *supra*. The conduct of said Joseph and Ann Judson, after they arrived at age; was a sufficient ratification of the sale and conveyance to these appellees. Evidence on this point discussed, and following authorities cited and commented on: *Thomasson v. Boyd*, 13 Ala. 420; *Shropshire v. Burns*, 46 Ala. 114; *West v. Penny*, 16 Ala. 186; *Martin v. Mayo*, 10 Mass. 137; *Phillips v. Green*, 5 Mon. 353. (4) By their purchase of the "mineral rights" these appellees became joint owners with the pretended minors of the "Burgin lands;" they bought, not the product of the land, but a part of the land itself.—*Heflin v. Bingham*, 56 Ala. 574; *Riddle v. Brown*, 20 Ala. 412; *Mitchell v. Billingslea*, 17 Ala. 393. They had just such possession of their interest in, or share of the lands, as it was understood and agreed they should have; and this possession has been unbroken ever since. They, therefore, held the "mineral rights" adversely to the pretended minors, and the deeds to Salmons, McDougal and to appellant are void. See *Elliott v. Horn*, 10 Ala. 354; *Pryor v. Butler*, 9 Ala. 418; *Hinton v. Nelms*, 13 Ala. 222; *Harvey v. Doe*, 23 Ala. 635; *Jackson v. Todd*, 6 Johns. 257; *Dexter v. Nelson*, 6 Ala. 68. (5) The purchase-money for said mineral rights has not been refunded. Until this be done, a court of equity will not give effect to an act of disaffirmance of the sale on the part of the pretended minors.—*Manning v. Johnson*, 26 Ala. 451; *Lynde v. Budd*, 2 Paige, 192; *Badger v. Phinney*, 15 Mass. 359; *Roberts v. Wiggin*, 1 N. H. 73; *Roof v. Stafford*, 7 Cow. 182; *Smith v. Evans*, 5 Humph. 70; *Bartholomew v. Finnemore*, 17 Barb. 430; *Delano v. Blake*, 11 Wend. 86; *Palmer v. Miller*, 25 Barb. 402; *Hillyer v. Bennett*, 3 Edwards' Ch. R. 222; *Goodman v. Winter*, 64 Ala. 437. (6) The Eureka Company was a *mala fide* purchaser of the said mineral rights, inasmuch as the purchase was made with a full knowledge of

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the prior rights of these appellees; and was made, also, of vendors who had like notice, prior to the pretended sales to them. *Le Neve v. Le Neve*, 3 Atk. 646; Wade on Law of Notice, §§ 11, 13, 17, 27, 32, 33, 50, 55, and 65; *Taylor v. Stribbert*, 2 Ves. Jr. 437; 1 Story's Eq. Jur. § 409; *Murray v. Ballou*, 1 Johns. Ch. 566; *Heatley v. Finster*, 2 Johns. Ch. 158; *Champion v. Brown*, 6 Johns. Ch. 398; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Bryant v. Booze*, 55 Ga. 438. (7) The deed from Mary T. Burgin was made *in trust* for the benefit of all the children of Jesse B. W. Burgin; and these appellees, as purchasers from them, may now establish and enforce the trust in defense of this cause and in the protection of their rights in the property against the appellant, it, together with its vendors, having notice of the trust. See *McVey v. Parker*, 64 Ala. 493; *Venable v. Thompson*, 11 Ala. 148; *Graham v. Lockhart*, 8 Ala. 24; *Barrell v. Hanrick, Adm'r*, 42 Ala. 71; *Kennedy v. Kennedy*, 2 Ala. 571. (8) The right to disaffirm a contract made during minority is a personal privilege; and hence, the appellant can not avail itself of the minority of the said Joseph and Ann Judson, to avoid their deeds. *Shropshire v. Burns*, 46 Ala. 115; *Jefford v. Ringgold & Co.* 6 Ala. 547.

STONE, J.—The rule we have established in reviewing findings of the court of chancery on facts, is to affirm, unless we are clearly convinced the court has erred. But if clearly convinced of error, a reversal follows.—*Rather v. Young*, 56 Ala. 94; *Bryan v. Hendrix*, 57 Ala. 387; *Nooe's Ex'r. v. Garner's Adm'r.* 70 Ala. 443. We have very carefully examined the testimony in this case, and have reached the following conclusions:

First, that when the deed of the mineral rights was made to Giles Edwards and his associates—June 12th, 1869,—Joseph C. Burgin and Ann Judson Thrasher were each under twenty-one years of age; that Joseph C. was born in January, 1850, and Ann Judson in February, 1852. On this point, we think the testimony leaves no room for doubt.

Second, it is contended that on the day when the deed to Edwards was executed, Mary Burgin, their mother, stated, in the presence of Joseph C. and Ann Judson, that they were each of lawful age, and that neither of them contradicted her statement. Some other testimony is offered, tending to show Joseph C. Burgin stated he was then twenty-one years old. This testimony is relied on by appellees in two aspects: *first*, as an estoppel *in pais*; and, *second*, as proving fraud on their part, which will deprive them of their plea of infancy. We consider it unnecessary to decide either of these legal questions,

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for the proof is wholly insufficient to establish the alleged fact. On the contrary, taking the testimony for our guide, we are clearly convinced that if the chancellor found such declaration had been made in their presence and hearing, he erred. See *Clark v. Goddard*, 39 Ala. 164.

Third, it is contended that the deed of Mary T. Burgin was made to Joseph C. and Ann Judson, in trust for all the children of Jesse Burgin, their father. The testimony is wholly insufficient to establish this. In truth, there is no legal testimony bearing on this question. What Mary T. Burgin may have said, after executing the deed, of what her intention had been in its execution, can not vary, affect, or impair the rights of the grantees under it.—1 Brick. Dig. 843, §§ 554–5; *Ib.* 844, § 563. But if this alleged fact were proved, the legal effect would probably be the same.—*Patton v. Beecher*, 62 Ala. 579; *Lehman v. Lewis*, *Ib.* 129.

We have not found in this record any evidence that either Joseph C. or Ann Judson ratified the sale and conveyance made to Edwards and his associates, after the former became of age. Mere inaction for the time shown in this record can not be construed into a ratification. It requires some positive act knowingly done, affirming the contract, or which is inconsistent with the right to repudiate it, to constitute a binding ratification, unless the sale and conveyance are acquiesced in for a sufficient time to perfect a bar.—*Slaughter v. Cunningham*, 24 Ala. 260; 7 Wait's Actions & Def. 144; *Tucker v. Moreland*, 10 Pet. 58; *Irvine v. Irvine*, 9 Wallace, 617; *Derrick v. Kennedy*, 4 Por. 41; *Chapin v. Shafer*, 49 N. Y. 406; *N. H. Mut. Ins. Co. v. Noyes*, 32 N. Y. 345; *Boody v. McKenny*, 23 Me. 517; *Thomas v. Pullis*, 56 Mo. 211; *Walker v. Ellis*, 12 Ill. 470; *Prout v. Wiley*, 28 Mich. 164; *Dixon v. Merritt*, 21 Min. 196.

There is nothing in the argument that when the Eureka Company, and those under whom it claims, acquired their title, Giles Edwards and his associates were in possession of the lands, claiming ownership of the minerals, and that complainant's purchase was therefore void. To come within this principle, there must be an actual adverse holding under claim of right.—*Bernstein v. Humes*, 60 Ala. 582. There is no evidence that Edwards and his associates were in the actual possession of the lands at any time.

The present bill was filed by the Eureka Company, averring and proving it was in possession; and it seeks to have the deed to Edwards and his associates cancelled, as a cloud on the title of complainant. It avers that the title in fee to the lands was in Joseph C. and Ann Judson, at the time Mary Burgin and all her children conveyed the mineral rights to Giles Edwards

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and associates, that of the purchase-money paid for the mineral rights—eleven hundred dollars—only one hundred dollars each was received by said Joseph C. and Ann Judson, and that they had each used and expended said money before they severally reached the age of twenty-one years. The testimony proves these averments to be true. The title set up by complainant is as follows: Conveyance of Joseph C. Burgin of his half interest to Salmons, and of Ann Judson Thrasher and her husband of her half interest to McDougal, and conveyance by him to Salmons; then conveyance by the latter to the complainant. It is thus shown that appellant—complainant below—stands in the shoes, and can assert only the rights which Joseph C. Burgin and Ann Judson Thrasher could originally assert. Appellee contends that if the complainant has made a good case on all the points noted above, the contract of sale to Edwards and associates can be disaffirmed and set aside, only on condition that the money paid by them for the mineral rights is either paid or tendered to them; and that inasmuch as the present bill seeks affirmative relief against their prior purchase, the bill should tender to them the eleven hundred dollars they paid, and interest upon it. The defense further claims that, if mistaken in the amount the complainant should have offered to pay, the bill should at least have offered to refund the two hundred dollars received by Joseph C. and Ann Judson, and interest upon it.

A distinction is taken in the books between executory and executed contracts made by infants. In the former class of cases, if the infant on becoming of age disaffirms the contract, then the adult purchaser or contractor will be forced to become the actor, to have the contract performed. In such case the infant, or *quondam* infant, is under no conditions or limitations in asserting the invalidity of the contract. Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back any thing he may have acquired or received under the contract. The most that can be required of him is, that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one, then, on demand or suit, he can be held to account for it. The rule is different when the contract has been executed. Then the *quondam* infant, or any one asserting claim in his right, must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be decreed to him. This is the difference between asking and resisting relief.—*Roof v. Stafford*, 7 Cow. 179; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Bartholomew v. Finnemore*, 17 Barb. 428; *Smith v. Evans*, 5 Humph. 70;

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Mustard v. Wohlford, 15 Grat. 329; *Bedinger v. Wharton*, 27 Grat. 857. But it is only in equity this principle obtains. If the suit be at law, the tender need not ordinarily be made, as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be still *in esse*, and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender, or offer to produce or pay, as the case may be. Not so, if the infant has used or consumed it during his minority.—*Badger v. Phinney*, 15 Mass. 359; *Price v. Furman*, 27 Verm. 268; *Chandler v. Simmons*, 97 Mass. 508; *Walsh v. Young*, 110 Mass. 396; *Green v. Green*, 69 N. Y. 553; *Dill v. Bowen*, 54 Ind. 204; *Phillips v. Green*, 5 T. B. Monroe, 344; *Goodman v. Winter*, 64 Ala. 410; *Roberts v. Wiggin*, 1 N. H. 73.

We have examined *Martin v. Martin*, 35 Ala. 560, and think the first principle stated in the opinion is not supported by the authorities cited, or by principle.

The bill in the present case avers, and the proof sustains it, that the money received by Joseph C. and Ann Judson in the sale to Edwards, had been consumed and disposed of by them while they were minors. This relieved complainant of the duty of tendering, or offering to pay. If it did not, then the offer in the present bill would be insufficient. The offer is "to do equity, and to abide by and perform such things as, under equity and good conscience, may seem meet to entitle it to a decree for the cancellation of said deed." The offer should have been to refund the money, with interest. There was, however, no demurrer to the bill. Under no circumstances, would it be necessary for Joseph C. and Ann Judson to repay the money which had been paid to the other Burgins.

There is nothing in the argument that McDougal, Salmons and the Eureka Company had notice of the prior conveyance to Edwards. That conveyance conferred a legal title, or it conferred nothing. It is only when there is a prior right, legal or equitable, that notice, actual or constructive, becomes material, to intercept or dominate an after acquired title. The disaffirmance of the sale made by the infants to Edwards, destroyed all his claim, both legal and equitable, which their deed had vested in him, and left in him no pretense of any equity, to assert against a later purchaser with notice.

The decree of the chancellor is reversed, and the cause remanded, that the complainant may have the relief prayed by its bill. It should be borne in mind that the deed to Edwards and associates can be cancelled only as to Joseph C. and Ann Judson. The grantees are entitled to the custody and owner-

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ship of their deed, as against the other grantors. The deed should not, on its face, be marred or mutilated.

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Settlement of Administration in Court of Equity.

1. *When party to bill in equity estopped from objecting, on appeal, to order granting rehearing.*—Where, after a rehearing was granted in a suit in equity on application of the defendants, the complainant, without objection, entered upon a second trial, he there impliedly consented for the court to pass judgment upon the merits; and he is, therefore, estopped from raising the objection, on appeal, that the order granting the rehearing was made in vacation, and did not come within the influence of the 80th Rule of Chancery Practice.

2. *Decree of distribution of assets of estate between distributees; when free from error.*—On the principle that equality is equity, it was held that, under the facts of this case, the decree of the chancellor, making distribution of the assets of a decedent's estate among distributees, was free from error.

APPEAL from Limestone Chancery Court.

Heard before Hon. THOMAS COBBS.

In the matter of the final settlement of the administration of A. Houck upon the estate of Hopkins L. Houck, deceased, had before the register of said court, under a decree taking jurisdiction of said estate, and ordering a reference, on bill filed for a final settlement and distribution, by Josephine Johnson, one of the distributees, entitled to a distributive share of one-half, against said administrator, the administrators of the estate of William Grizzard, deceased, who was a surety on the administration bond of the said A. Houck, and another surety thereon, and also against Charles N. Bell and Charles H. Bell, the other distributees in said estate, entitled together to a distributive share of one-half, they taking *per stirpes*. The administrator being insolvent, a receiver was appointed to collect, and who did collect a claim against the Government, which had been allowed by Congress to said estate. The net proceeds of this claim were afterwards paid over to the register, and the contention is over the distribution of this fund.

On June 9, 1879, a compromise was made between the parties, by which it was agreed, that A. Houck, as administrator of the estate of Hopkins L. Houck, was indebted to said estate in the sum of \$5,592.27; that the estate was indebted to the administrators of the said William Grizzard in the sum of

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\$1,806, which was to be deducted from the amount due from A. Houck on account of his administration; that the complainant had been paid on her distributive share \$1,580.15, but that the administrator had paid nothing to the Bells, the other distributees, on their distributive shares; that the payments made to the complainant should be credited on her share in the balance remaining due from the administrator, after deducting what the estate owed to the administrators of said Grizzard, and that her decree for the balance due her on her distributive share should be "receipted in consideration of the premises;" and that the funds paid to the register by the receiver "shall be disposed of as equity and justice require." The register made a report in accordance with the terms of this compromise, and the cause was submitted for decree on the report, and also on a petition, previously filed by the defendants, Bells, averring that they had also compromised with the administrators of William Grizzard his liability to them as surety on the bond of A. Houck, as administrator of the estate of Hopkins L. Houck, for \$750, which had been paid to them; that this was all they had received from said estate; and insisting that the funds in the hands of the register should be paid to them.

The chancellor, Hon. H. C. SPEAKE, held the cause up for decree in vacation; and on 8th October, 1880, filed in the register's office a decree, based on the agreement of compromise, discharging the administrators of William Grizzard, and also the estate of A. Houck, he having died after the commencement of this suit, from further liability to the distributees of the estate of Hopkins L. Houck, and distributing the said fund in the hands of the register, then amounting to \$738.70, one-half to the complainant, and the other half equally between the Bells.

On 24th November, 1880, in vacation, on application of the Bells, a rehearing was granted in the cause by Hon. THOMAS COBBS. This application appears to have been filed in the register's office on 5th November, 1880, and seeks a rehearing as to the distribution of the fund in the hands of the register.

At the spring term, 1881, the cause was again submitted for final decree, on the report of the register, agreement of parties, etc., both parties appearing by their solicitors, and no objection being made by either party, so far as disclosed by the record. On this submission the chancellor caused a decree to be entered, finding and declaring that the fund in the hands of the register was insufficient to make the share represented by the Bells equal to the amount which had been received by the complainant, and therefore ordering that said fund be equally distributed between the said Bells.

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That decree and the order granting the rehearing are here assigned as error.

CABANISS & WARD, for appellant.

McCLELLAN & McCLELLAN, *contra*.

SOMERVILLE, J.—It is objected by appellant's counsel, and assigned for error, that the chancellor had no authority to grant a rehearing in this cause *during vacation*, and re-instate it upon the docket of the chancery court to be again tried. Whether the enrollment of such an order, at any time before the second day of the next ensuing term, would not operate to bring the case within the influence of Rule 80 of Chancery Practice, need not be decided. It is enough that the appellant entered upon the second trial, after re-instatement of the cause, without objection, and consented impliedly for the court to pass judgment upon the merits. This would estop her from raising the objection at this time in the appellate court.—*Byrd v. McDaniel*, 26 Ala. 582; *Walker v. Jones*, 23 Ala. 448; *Hair v. Moody*, 9 Ala. 399.

The disposition made by the chancellor of the fund in the hands of the register was, in our judgment, correct. The appellant and the Bells were entitled respectively to one-half of the entire estate of Hopkins L. Houck by way of distribution, after the payment of all lawful charges against it, in the hands of the administrator. This interest in the money and *choses in action* was an undivided equitable interest. The compromises made with the administrator and his sureties must enure equally to the benefit of the distributees, taking, of course, *per stirpes* and not *per capita*. Equality is equity, and this rule must prevail in the absence of its abrogation by agreement of parties litigant who contract *sui juris*.

Affirmed.

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Statutory Real Action in the Nature of Ejectment.

1. *Adverse possession; what necessary to avoid deed made by one out of possession.*—While to avoid a deed to land executed by one out of possession, it is enough, if there be one in adverse possession, exercising acts of ownership, and claiming to be rightfully in possession, with or without.

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out color of title, such adverse possession, to have this effect, must be actual, not constructive; and it must be marked by acts of dominion, such as the erection of houses, making valuable improvements, clearing lands, claiming ownership, or, by some other act, evidencing that the possession is under claim of right.

2. *Same; when possession under claim of right.*—Putting a tenant in possession, who erects a house thereon, and continues to occupy for a series of years, is, unexplained, a possession under claim of right.

3. *Same; what is actual possession and its effect as notice.*—Actual possession is an open, patent fact, which furnishes evidence of its own existence; and it is notice to all men contracting in reference to the property thus possessed, and is equivalent to actual notice of title, legal or equitable, or of the claim under which such possession is held.

4. *Actual adverse possession; what notice sufficient to avoid deed by one out of possession.*—In order to avoid a deed executed by one out of possession on the ground of an actual adverse possession by another under claim of right, actual notice of such adverse holding is not required, but the notice implied from possession is sufficient.

5. *When right of possession in mortgagor subject to sale under execution; title of purchaser.*—Where a deed of trust conveying lands, executed to secure a series of bonds having several years to run, after reserving the possession and enjoyment of the premises in the grantor, provided that before the trustee could enter and take possession, there should be a delay of sixty days after default, a demand of payment, and a request from the holder of the bonds; and afterwards default was made, but the trustee did not take the steps necessary to entitle him to enter and take possession,—*held*, that the right of possession and enjoyment in the grantor was a valuable interest, a legal estate, which was subject to levy and sale under execution, and that the purchaser of that interest acquired such an estate as would support ejectment.

6. *When deed of trust not an outstanding title in a stranger.*—In such case the deed of trust is not such an outstanding title in a stranger as will defeat a recovery in ejectment by a plaintiff claiming under the purchaser at execution sale.

7. *When deed to land not void on its face for uncertainty.*—A sheriff's deed to a lot of land in a city which was sold under execution, and which is described in the deed as "part of lot seventeen, fronting on Gallatin street fifty feet, extending eastwardly seventy-three feet, as the property of said Isaac Jamison," is not, on its face, void for uncertainty, as it might be shown by extrinsic proof that the entire front of the lot on Gallatin street was only fifty feet; or that Jamison, at the time of the execution of the deed, owned a defined part of the lot fronting on said street, measuring fifty feet, and known "as the property of said Isaac Jamison."

8. *When deed void for uncertainty.*—But when such deed is considered in connection with extrinsic proof, showing that lot seventeen fronts on Gallatin street about one hundred and forty-seven feet, all of which had been conveyed to Jamison except about twenty-five feet, none of which is shown to have been disposed of by Jamison at the date of the execution of the deed; and it is not shown that the fifty feet front had ever been separated from the residue, or that there was any identification of any fifty feet front, known "as the property of said Isaac Jamison," the property is not sufficiently identified, and the deed is void for uncertainty.

9. *Identification of land in deed by extrinsic proof.*—When identification of land in a deed is sought to be established by extrinsic proof, it must be shown by proof of facts—facts still existing, or which are shown to have once existed. Opinion or conjecture as to the land intended to be conveyed will not do.

10. *When abstract charge error.*—Where the effect of an abstract charge, given by the court *ex mero motu*, though asserting a correct legal proposition, is, when considered in connection with the evidence, to mislead the jury, the giving of the charge is a reversible error.

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APPEAL from Madison Circuit Court.

Tried before Hon. LOUIS WYETH.

This cause was decided at the December term, 1880, but has not been reported. The record in the case could not be found by the reporter. He has also endeavored to obtain the original bill of exceptions; but, as he was informed, that has also been mislaid or lost. As the opinion, however, can be understood, on the important questions decided, from the facts stated in it, especially when aided by the facts appearing in the report of the case on former appeal (*Bernstein v. Humes et al.*, 60 Ala. 582), it is thought best to report it. Paragraph 5 of the general charge of the Circuit Court, and charges asked, numbered 1 and 1 B, referred to in the opinion, judging from their connection, raised the same question as was raised by paragraph numbered 4½ of the general charge, which is set out in the opinion.

It appears from the report of the case on former appeal, that this was a statutory real action, commenced on 12th July, 1871, by Mrs. E. C. Humes and others against Morris Bernstein; and that the lot sued for is thus described: "The following tract or parcel of land, situated in the city of Huntsville, in said county of Madison, known and described as follows: Part of lot number seventeen in the original plan of said city, fronting on Gallatin street, commencing on said street ninety-nine feet from the north-west corner of said lot number seventeen, and running thence southwardly along said street thirty-eight and one-half feet; thence eastwardly, and at right angles with said street, one hundred and sixteen and one-half feet; thence north-westwardly, on a line parallel with said street, thirty-eight and one-half feet; thence westwardly, at right angles with said street, to the beginning; also another part of said lot, commencing at the north east corner of that part above described, running northwardly, on a parallel line with Gallatin street, ninety-nine feet; thence westwardly, and at right angles with said street, two feet; thence southwardly, and on a line parallel with said street, ninety-nine feet; thence eastwardly, at right angles with said street, to the beginning." As further shown by said report, "the premises sued for were situated in a square or block, which was bounded on the north by Clinton street, east by Jefferson street, south by Randolph street, and west by Gallatin street; and this square was subdivided, according to the original map of the city, into four lots, numbered 17, 18, 25 and 26, respectively; each lot measuring one hundred and forty-seven feet and six inches in width, and the same in length. Lot number seventeen was the north-west quarter of the square, and the defendant owned the north-west quarter of it. The plaintiffs owned nearly the whole remaining part of the square,

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their lands adjoining the defendant's on the east and south. Of the two fractional lots sued for, the one fronting thirty-eight and one-half feet on Gallatin street was the southern part of the premises claimed by the defendant, and the narrow strip, two feet in width, was on the east. The main controversy was in reference to the large lot; the only question as to the other being, whether the division fence was on the proper line. The plaintiffs claimed the premises sued for as a part of the property which once belonged to the 'Bell Tavern,' and afterwards, to the 'Huntsville Hotel Company;' and they deduced their title from the said company, under a deed from the United States marshal to L. P. Walker, as the purchaser at a sale under execution against the company, and a deed from said Walker to themselves."

It further appears from the opinion on the former appeal (60 Ala. pp. 598-9), that the deed from the Huntsville Hotel Company to Donegan and Hammond, as trustees, was executed on 1st June, 1861, to secure the payment of thirty-five thousand dollars of bonds which the company proposed to issue, with eight per cent. interest payable semi-annually; the principal of the bonds to be due and payable in five equal installments, of \$7,000 each, "due on the first of January, from the years 1872 to 1876, each inclusive."

BRANDON & JONES, for appellant.—(1) In ejectment plaintiff can not recover, unless he had, at the commencement of the suit, a legal, as distinguished from an equitable, title, and the right of possession.—*Williams v. Hartshorn*, 30 Ala. 211. He must recover on the strength of his own title, without regard to the strength or weakness of that of the defendant. *Brock v. Yongue*, 4 Ala. 584. (2) The law-day of the mortgage executed by the Huntsville Hotel Company having passed, nothing but an equity of redemption remained in the company, and Walker, as purchaser at execution sale, took nothing but this equity. This will not support ejectment.—*Bernstein v. Humes*, 60 Ala. p. 582; *Welsh v. Phillips*, 54 Ala. pp. 309, 317; *Barker v. Bell*, 37 Ala. 354; *Pauling v. Meade*, 32 Ala. 11; *Pryor v. Butler*, 9 Ala. 418; 31 Maine, 246; 13 Vt. 129. (3) This deed constituted an outstanding title in a stranger. See authorities *supra*. (4) Adverse possession of itself is notice of the title or claim under which the possession is held.—5 Peters, p. 402; 6 Pick. p. 172; 16 Ala. 596; 15 Ala. 372; 9 Ala. 409; 22 Ala. 156; Ang. on Lien, pp. 427, 481. (5) The deed from the sheriff to Elliott, and those following it are void for uncertainty, and create a break in plaintiff's chain of title. *Pollard v. Maddox*, 28 Ala. 321; *Boardman v. Reed*, 6 Peters, 328; *Capen v.*

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Glover, 4 Mass. 305; 1 Greenl. on Ev. §§ 350, 300-1, 297. (6) The plaintiff must prove a continuous title, a complete chain; and if any of the deeds in the chain are void, lapse of time will not prove them, and the whole title fails. *Jenkins v. Noel*, 3 Stew. 60; *Hathaway v. Clark*, 5 Pick. 490; 1 Greenl. on Ev. §§ 25-6.

HUMES & GORDON, *contra*.—(1) As against all persons except the mortgagee and those claiming under him, the mortgagor is considered the owner of the land, *so long as he remains in possession*; and if the mortgagee does not disturb the possession of the mortgagor, a subsequent purchase from the mortgagor is valid and effectual.—*Knox v. Easton*, 38 Ala. 345; *Doe v. McLoskey*, 1 Ala. 708; *Hitchcock v. Harrington*, 6 Johns. 290; 1 Hilliard on Mortg. Ch. VIII. p. 162, § 15. (2) A claim of adverse possession, the statute of limitations, or maintenance can not be invoked by a mere naked trespasser.—*Badger v. Lyon*, 7 Ala. 564; *Doe v. Eslava*, 11 Ala. 1029; *Brown v. Lipscomb*, 9 Port. 472; *Hinton v. Nelms*, 13 Ala. 222. (3) The deed from Acklen, sheriff, is not void for uncertainty in description.—*Ellis v. Martin*, 60 Ala. 394; *Clark v. Few*, 62 Ala. 243; *Clements v. Pearce*, 63 Ala. 284; *Slater v. Breese*, 36 Mich. 77; *Reidinger v. Cleveland Iron Co.* 39 Mich. 30.

STONE, J.—When this case was before in this court, 60 Ala. 582, 602, we said: “To avoid a deed made by one out of possession, it is enough if there be one in adverse possession, exercising acts of ownership, and claiming to be rightfully in possession. Color of title is not necessary.” We fortified that opinion by a citation of many authorities. Possession, to have this effect, must be actual, not constructive. And it must be marked by acts of dominion, such as the erection of houses, making valuable improvements, clearing lands, claiming ownership, or by some other act, evidencing that the possession is under claim of right. Putting a tenant in possession, who erects a house thereon, and continues to occupy for a series of years, is, unexplained, a possession under claim of right. Much less than this would be sufficient evidence in many cases of adverse holding. Actual possession is an open, patent fact, which furnishes evidence of its own existence. It is notice to all men contracting in reference to the property thus possessed, and is equivalent to actual notice of title, legal or equitable, or of the claim, under which such possession is held.—2 Brick. Dig. 519, § 181.

In paragraph numbered 4½ of the general charge, the Circuit Court correctly declared that “no one can sell land which

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another has in adverse possession under claim of right." He erred when he informed the jury that this rule does not "apply, when the true owner sells the property in ignorance of such adverse holding." The natural and necessary effect of such charge was, to give the jury to understand that to render the rule applicable, the seller must have had notice or knowledge of the adverse holding, other than the actual possession gave him. The concluding clause of paragraph 5 of the general charge is equally erroneous. And charges asked, numbered 1 and 1 B, should have been given.

The question of outstanding title in another. It is true the record shows fully that the property in controversy, if embraced in the tract of the Huntsville Hotel Company, was under mortgage or trust deed to another, to secure bonds and accrued interest, which had matured when this suit was brought. Hence, the hotel company was in default. The mortgage or trust deed contains the following clauses: "But nothing herein contained shall be construed so as to prevent the Huntsville Hotel Company from using the building for hotel purposes, renting, and receiving payment therefor, of any part of such hotel building, not necessary for the hotel, nor from disposing of any part of the lot or grounds upon which said building is situated, which may not be required for the use of said hotel, nor from using any furniture, stores or fixtures which may be necessary in conducting the business of said company, or from collecting and paying out all or any moneys that now is, or hereafter may be due said company, provided that no default shall have been made in the payment of the interest and principal of any of the described bonds.

. . . Upon the following trusts, that is to say: In case the said Huntsville Hotel Company shall fail to pay the principal, or any part thereof, or any of the interest on said bonds, at any time when the same may become due and payable, according to the tenor thereof, when demanded, then after sixty days from such default, upon the request of the holder of such bonds, the said Donegan and Hammond—[grantees and trustees]—and their successors in such trust, may enter into and take possession of all or any part of said premises," etc. It will be seen from these extracts from the trust deed, that the right of the Huntsville Hotel Company to retain possession of the property did not terminate *ipso facto* with their default in paying the principal or interest of the bonds. There must have been, first, a demand of such payment, second, a request of the holder of such bonds, and, third, a delay of sixty days after such default, before the trustees would be authorized to enter into and take possession. None of these steps are shown to have been taken, and therefore it is not shown that the right

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of the hotel company to possess and occupy has ever terminated. This was a valuable interest, a legal estate, and was subject to levy and sale under execution. The purchaser of such interest, until it is determined, acquires such estate as will support ejectment. *Brook v. Yongue*, 4 Ala. 584; *Badger v. Lyon*, 7 Ala. 564; *Smith v. Taylor*, 9 Ala. 633; *Br. Bank v. Fry*, 23 Ala. 770; *Knox v. Easton*, 38 Ala. 345; 1 Brick. Dig. 905, § 207. The Circuit Court did not err in holding there was a failure to show an outstanding title in a stranger which could defeat this action.

It is settled law—too well settled to require a citation of authorities—that in an action of ejectment, or statutory real action, plaintiff can not recover unless he shows a sufficient legal title in himself, or a right to the possession. The defendant may have no title, may be a mere trespasser; still, if he has not entered as the tenant of plaintiff, and thus recognized his title, it is sufficient for his defense that plaintiff shows no right to recover. An older possession often proves title against one who shows only a later possession, but this rests on the presumption that one who has had a prior possession of land, exercising acts of ownership and control, is treated as the owner against such subsequent occupant, unless the latter shows title in himself, or some other, or unless he has held the possession adversely for a sufficient length of time to bar the plaintiff's right of entry. In this case the laboring oar was with the plaintiffs, *Humes et al.* The suit is to recover a part of lot 17 in the city of Huntsville. The deeds through which plaintiffs attempt to deduce their title, describe lot 17 as containing a half acre. It is bounded north on Clinton street, and west on Gallatin street. If the lot is a square, each of its four sides is about one hundred and forty-seven feet and eight inches in length. The plaintiffs in this case do not, as we understand the case, rely on previous possession in those under whom they claim. They rely on a documentary chain of title, commencing as far back as 1816. There was then a deed from Pope to Cannon, conveying lot 17, town of Huntsville, fronting Clinton and Gallatin streets, described as "a certain parcel or half acre of land." Deed, December 18th, 1818, from Cannon to Price, conveying same lot by same description. Deed, November 23rd, 1822, from Price to Stokes, conveying same lot by same description, "*with the reserve of twenty-five feet fronting on Gallatin street where the brick house stands, running back seventy four feet nine inches, at right angles.*" Deed, February 4th, 1823, from Stokes to Rogers, conveying same lot with same description, and same reservation. Deed, January 31st, 1826, from Rogers to Jamison, conveying same lot with same description and same reservation. Title is thus traced, and

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vested in Jamison, of all of lot seventeen, except the part reserved, described above. The title to the reserved part, having the brick house on it, is left in Price, so far as this record informs us; or, rather, the record fails to inform us the title to that part ever got out of him. The next step in plaintiffs' chain of title is a sheriff's deed, dated April 2nd, 1832, conveying to Elliott "part of lot seventeen, fronting Gallatin street fifty feet, extending eastwardly seventy-three feet, as the property of said Isaac Jamison, etc." Deeds, conveying lands by similar description, from Elliott to Sadler, dated March 4th, 1833—from Sadler to Horton, April 7th, 1834,—Horton and Robinson to Caldwell, August 18th, 1838,—Caldwell to Yeatman and wife, February, 22d, 1839,—Yeatman and wife to Erwin, September 7th, 1840,—Yeatman and wife to Turner, February, 23rd, 1839,—Turner, trustee, to Wood, October 1st, 1844, conveying several pieces of property, and among the rest, "part of lot bought by said Caldwell of Rodah Horton and wife and John Robinson and wife, and by them conveyed to the said Caldwell; the above property embraces, and is intended to embrace the establishment in the town of Huntsville known as the Bell tavern, now occupied by the said Agnes Yeatman, and kept by her as a hotel." From Wood and wife to Kinkle, October 21st, 1847, after describing other lands (the hotel property), conveying same lot with same description, as that found in sheriff's deed to Elliott—Kinkle to Lane & Davis, June 5th, 1851, conveying several lots, and the same lot described as in sheriff's deed to Elliott. From Davis to North Alabama College, March 4th, 1852, conveying several lots and the lot as described in the sheriff's deed aforesaid. From North Alabama College to Huntsville Hotel Company, April 16th, 1857, conveying several lots, and with them part of lot seventeen, described as above. Deed of U. S. marshal to Walker, February 7th, 1870, conveying lots 17, 18, 25 and 26, and the improvements thereon; and Walker to plaintiffs, May 22nd, 1871. The chain of title shown by plaintiffs left all of lot 17 in Jamison, except the reserve of twenty-five feet front on Gallatin street, running back seventy-three feet, and except the fifty feet front on Gallatin street, running back seventy-three feet, conveyed by sheriff to Elliott.

Defendant's chain of title to that part of lot 17, which it is alleged was conveyed by sheriff to Elliott, and fronting on Gallatin street fifty feet, is as follows: Deed from Mrs. Hill to Battle, April 9th, 1858, conveying part of lot 17, "commencing at the north-west corner of the little brick house on Gallatin street, running thence eastwardly, at right angles with said street, and parallel with Clinton street seventy-four and one-half feet—thence at right angles to Clinton street—thence

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west to the north-west corner of said lot, thence south along Gallatin street to the beginning, being about sixty-seven feet, containing not quite one-eighth of an acre;" a second piece, lying east of above, not necessary to be here described; and "also another lot of land lying in said town, being part of said lot number seventeen, bounded on the north by lot first above described, on the east by the lot last above described, on the south by the Bell tavern lot, on the west by said Gallatin street, supposed to front on said street about twenty-five feet, and to run back east about seventy-four feet." Deed of Battle and others to Chappell, December 20th, 1861, conveying same premises, with same description, with disclaimer of warranty as to piece last above described. Deed from Chappell to Bernstein, December 21st, 1861, conveying same lands, with same description, and same disclaimer of warranty. These conveyances tend to show the following facts: That the north-west corner of the little brick house stood sixty-seven feet south of the north-west corner of lot 17; that the lot on which the brick house stood fronted twenty-five feet on Gallatin street; that Bernstein's entire front on Gallatin street—including the little lot on which the brick house stood—was sixty-seven feet plus twenty-five—ninety-two feet, and that adjoining to it on the south was the Bell tavern property; thus showing that the Bell tavern property extended north on Gallatin street to a point ninety-two feet south of the north-west corner of lot seventeen. The property recovered in this suit is south of that point, and hence, Bernstein fails to show any title to the property in controversy. There is great contrariety, if not conflict in the testimony, as to the particular locality or spot on which the little brick house stood. The probable great length of time since its demolition or removal, may, to some extent, account for this. We attach more importance to the expressed distances in the deeds, than to the recollection of witnesses. But, as we have said, the plaintiff must recover, if at all, on the strength of his own title, not on the weakness or absence of his adversary's.

It is contended for appellant that the deed from the sheriff to Elliott, and those which follow it, are so indefinite in the description of the property sold and attempted to be conveyed, as to be void for uncertainty. This can hardly be affirmed, as matter of law, on the face of the deeds. True, they speak of part of lot seventeen, showing that the whole of that lot was not embraced in it. But we can not judicially know the extent of that lot's front on Gallatin street. Its entire front on that street, looking alone to the deed, may have been only fifty feet. Or it may be that Jamison, at that time, owned a defined part of the lot fronting on Gallatin street, measuring fifty

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feet, and known "as the property of said Isaac Jamison." If so, then outside proof of such fact would enable any competent surveyor to determine and locate the land sold. We are speaking of the deed itself, without reference to extrinsic proof. So considered, it can not be pronounced void on its face. Considered in connection with the extrinsic proof, the question is a very different one. Lot 17 fronts on Gallatin street about one hundred and forty-seven or eight feet. All of this property was conveyed to Jamison, except about twenty-five feet on which the brick house stood. He thus owned about one hundred and twenty-two feet on Gallatin street. The bill of exceptions states it contains all the evidence, and there is no evidence that the fifty feet front has ever been separated from the residue, or that there was any identification of any fifty feet, known as the property of said Isaac Jamison. There is an absence of proof that at the time the sheriff sold to Elliott, Jamison had disposed of any part of lot 17. True, at that time, a part of lot 17 was occupied and claimed by others, probably rightly claimed; but it is not shown that Jamison had conveyed any part of the lot. The part we speak of as being occupied and claimed by others, fronts on Clinton street, and is different from the part, the title to which we are now discussing. Construing the deed from the sheriff to Elliott, and the later deeds which copied its phraseology, in the light of the testimony in this record bearing on the question, we do not think it sufficiently identifies the property. Identification must be established by the proof of facts—facts still existing, or which are shown to have once existed. Opinion or conjecture of what was intended, will not do.—*Miller v. Travers*, 8 Bing. 244; *Pollard v. Maddox*, 28 Ala. 321.

In the affirmative charge is the following language: "If you believe from the evidence that Jamison owned lot No. 17, one side of which was on Gallatin street, and that he had previously sold all of said lot on Gallatin street that he owned but the fifty feet, and that that portion was known as the Jamison lot, then you may look to that evidence to guide you to a conclusion, whether or not the fifty feet fronting on Gallatin street, mentioned in Acklen's [sheriff's] deed, included or not the lot, or portion of land described in plaintiffs' complaint." This part of the charge was specially excepted to. As we have said, the record affirms it contains all the evidence, and it contains no testimony that Jamison had previously sold any part of lot 17 fronting on Gallatin street. Neither does it contain any evidence that the part of the land in controversy "was known as the Jamison lot." This charge, then, was abstract, because some of its predicates are unsupported by testimony. If an abstract charge, though asserting a correct legal proposition,

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when considered in connection with the evidence, must have misled the jury, this is ground of reversal.—*Partridge v. Forsyth*, 29 Ala. 200. The finding of the jury in this case shows the jury were misled by this abstract charge. The giving of it was, therefore, error.

Reversed and remanded.

BRICKELL, C. J., not sitting.

CASES

IN THE

SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1882.

Burns v. Campbell.

Trespass de bonis asportatis by Mortgagor against Mortgagee.

1. *Mortgage of personal chattels; right of mortgagee to possession.*—After default in the payment of a debt secured by mortgage, the mortgagee has the legal title and the right of immediate possession of chattels conveyed by the mortgage, authorizing a recovery thereof by him; and his right of possession is not affected by partial payments previously made by the mortgagor on the secured debt, unless it is so provided in the mortgage.

2. *Usury not available to mortgagor in trespass.*—In an action of trespass brought by a mortgagor against the mortgagee, for seizing personal property conveyed by the mortgage, usury is not available to the plaintiff for the purpose of showing, in connection with evidence of partial payments, that the mortgage debt has been paid, and the mortgage satisfied.

3. *Same.*—While a chattel mortgage is satisfied, and its lien extinguished, by payment of the mortgage debt, and a seizure by the mortgagee of the mortgaged property, after such payment, would constitute him a trespasser; yet, in an action of trespass brought against him by the mortgagor, founded on such seizure, no collateral investigation can be had into the usurious character of commissions charged by the mortgagee, who was a commission merchant, for selling cotton conveyed by the mortgage, in accordance with the terms thereof, for the purpose of showing a payment of the debt.

4. *Advances by mortgagee; what prices he may charge therefor.*—Under a mortgage securing future advances, the mortgagee is entitled to such prices as may be agreed on, or, in the absence of an agreement, to a fair and reasonable market valuation, estimated at the time and place of sale, and hence, evidence of prices paid by the mortgagee, purchasing at wholesale at another time and place, is inadmissible.

5. *Account stated; presumption of correctness.*—If an account is rendered to a debtor, and he admits its correctness, or retaining it, he makes no objection thereto within a reasonable time, he will be bound by it as an account stated, his silence in the latter event being an implied admission of its correctness; and if he only objects to one item, this is an admission of the correctness of the other items of the account.

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6. *Parol mortgage; what is.*—A verbal agreement between a mortgagor and mortgagee, made after the execution of the mortgage, that it should embrace a horse furnished to the former by the latter, and stand as security for the price thereof, is valid, at least, *inter partes*, as a parol mortgage; and, in an action of trespass by the mortgagor against the mortgagee for seizing other chattels conveyed by the mortgage, the fact that the horse belonged to the mortgagee's son, who was also his agent, is not available to the plaintiff for the purpose of reducing the mortgage debt, and of showing that it was paid, if the son consented to such a disposition of his property.

7. *When commissions agreed to be paid for selling mortgaged cotton not affected by sale through a broker at a lower rate.*—Nor can the mortgagor, in such action, be heard to complain, that the mortgagee, who was a commission merchant, employed a broker to sell for him the cotton shipped to him by the mortgagor, at a lower rate of commissions than that which the mortgagor agreed to pay him.

8. *Chattel mortgage with power of sale; right of mortgagee to take possession under.*—When any part of the debt secured by a chattel mortgage containing a power of sale, remains unpaid, the mortgagee may execute the power by taking possession of the mortgaged property, provided he does so without committing a breach of the peace, or violation of the criminal law.

9. *Confusion of goods; doctrine applies to mortgaged chattels.*—Where the owner of goods willfully, or through want of proper care, so mix or mingle them with the goods of another, that they can not be distinguished, the latter is entitled to the whole, unless he consented to the act; and this principle applies to mortgaged chattels, and a confusion thereof by the mortgagor with other chattels owned by him makes the whole *prima facie*, at least, subject to the lien and operation of the mortgage.

10. *Mortgage of after-acquired property; when no specific lien thereby created.*—A mortgage of property to be thereafter acquired, which is not the product, increase, or accretion of something already owned by the mortgagor, especially when only general terms of description are used, creates no specific lien on such after-acquired property, but is merely an agreement to execute a further mortgage.

11. *Trespass de bonis asportatis by the husband; damages to goods of the wife can not be recovered in.*—In trespass by the husband against his mortgagee for an alleged illegal seizure of goods under the mortgage, the plaintiff can not recover damages for a seizure of goods belonging to the *corpus* of the wife's statutory separate estate; but for such damages the wife must sue alone.

12. *Amendment by adding parties defendant; when not allowed.*—The statute authorizing an amendment of the complaint, by striking out or adding parties plaintiff or defendant (Code, § 3156), can not be construed so as to authorize the addition of parties defendant, who were not liable to be sued when the action was commenced, although they may have afterwards rendered themselves liable to the same action.

13. *Same; principal ratifying trespass by agent after suit brought, can not be made defendant.*—If an agent, acting in the name, and for the benefit of his principal, commits a trespass *de bonis asportatis*, which imposes a civil, and not a criminal liability upon the agent, the principal may, when fully informed, of the tortious nature of the act, adopt and ratify it; and such ratification, for many purposes, will relate back to the date of the unauthorized act, so as to constitute the principal a trespasser *ab initio*, ordinarily binding him to the same extent and imposing on him the same civil responsibilities as if he had originally authorized it; but this doctrine of relation, being a mere legal fiction, and allowed only for the advancement of right and justice, can not be so applied as to authorize the principal to be made a party defendant by amendment to a

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suit brought against the agent for such trespass, and commenced prior to his ratification of the agent's act.

14. *Trespass by agent; ratification by principal.*—To hold the principal responsible for damages resulting from a trespass *de bonis asportatis*, which is not indictable, on the ground of a subsequent ratification by him of the agent's wrongful act, it must appear that he ratified such act with a full knowledge of its tortious character; and the mere appropriation of the fruits of the trespass, without such knowledge, is not sufficient.

15. *Principal and agent; ratification by principal of agent's act.* Where the relation of agency exists, and the principal derives a benefit from an act done by the agent beyond the scope of the agency, he will be held to have ratified such unauthorized act by *acquiescence*, if, after being fully informed of what has been done, he fails to express his dissatisfaction within a reasonable time; but where the relation of agency does not exist when the act is done, but the act is that of a mere volunteer awaiting ratification, the silence of the principal will not be so readily construed into a ratification, except, perhaps, in cases where it might operate to the prejudice of innocent parties.

16. *Same; declarations by principal to agent, verbal acts and competent.* The declarations of the principal, when first informed of the seizure of the goods by his agent, ordering them to be returned to the plaintiff, and his message to his acting agent, instructing him to have nothing more to do with the goods, are in the nature of verbal acts, tending to show a repudiation of the agent's act, and are competent evidence for the principal in a suit against him and the agent for trespass growing out of such seizure.

17. *Evidence; question calling for mental status of party, illegal.* Where the principal is examined as a witness in his own behalf, in a suit brought against him for a trespass committed by the agent, a question propounded to him, by which he is asked whether, on being first informed of the trespass, "he approved or disapproved of it," would be irrelevant, if propounded with the view of eliciting a mere *mental* approval, unaccompanied by acts or words; and being ambiguous, and it not affirmatively appearing whether the answer would have been legal or illegal evidence, the primary court did not err in disallowing the question.

18. *Principal and agent; ratification by principal of agent's trespass.* If the principal, in good faith, and by suitable acts and declarations, repudiated the seizure of goods made by his agent under, and in execution of a power of sale contained in a mortgage executed by the plaintiff to the principal, the law would not make it incumbent on him to actively interfere to compel restoration of the goods to the plaintiff, unless they had come into his custody, or under his control. His failure, however, to counsel restoration, or to re-assert control over the mortgage under which the seizure was made, if satisfactorily proved, may be looked to by the jury, as tending to prove acquiescence.

19. *Same.*—In all cases of trespass by an agent, for which the principal is sought to be held liable on the ground of a subsequent ratification by him of the agent's act, the law requires, with good reason, "substantial proof of ratification."

20. *Evidence; res gestæ.*—In an action of trespass by the mortgagor against the mortgagee and his agent for a seizure, under a power of sale in the mortgage, of mortgaged chattels, the written notice of the sale, and the sale itself of the chattels by the agent, are admissible in evidence, being merely cumulative evidence of the intention of the agent in taking the goods, and, as such, a part of the *res gestæ* of the alleged trespass, shedding light on the dominion over the goods previously asserted.

21. *Trespass de bonis asportatis; measure of damages.*—In trespass

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for taking goods, if the taking is merely unlawful, the measure of damages is, generally, the value of the goods, or amount of injury done to them, as the case may be, with interest to the date of judgment; but if the taking is perpetrated in a rude, wanton, reckless, or insulting manner, or is accompanied with circumstances of fraud, malice, oppression, or aggravation, or even with gross negligence, the party injured is entitled to receive exemplary damages.

22. *Same; malice of agent as affecting damages against principal.* The rule is, that, where several defendants are sued in tort for damages, the malice or other evil motive of one can not be matter of aggravation, or ground of vindictive damages against the other; and hence, principals are not generally held liable for such damages by reason of the evil motive of the agent, unless the act of the agent was fully ratified with a knowledge of its malicious, aggravating, or grossly negligent character; or these matters of aggravation were probably consequent on the doing of the wrongful act ordered by the principal; or unless the agent was employed with a knowledge of his incompetency.

23. *Evidence; when letter by agent is admissible in action of trespass against principal and agent.*—In an action of trespass against principal and agent, for the seizure by the agent of plaintiff's goods, a letter written by the agent two days before the seizure, directed to the plaintiff, and received by him in due course of mail, and endorsements made on the envelope by the agent, evincing an unfriendly feeling towards the plaintiff, is relevant and competent, on proof of handwriting, as tending to show malice or an evil motive on the part of the agent, which may have entered into, or given color to the transaction.

24. *Trespass; evidence of malice; when inadmissible.*—In trespass against principal and agent, founded on the seizure by the agent of goods of the plaintiff under a mortgage to the principal, where it is sought to charge the latter by reason of a subsequent ratification of the agent's act, the fact that the principal commenced a criminal prosecution against the plaintiff about the time of the seizure, is not competent evidence for the plaintiff, in the absence of all evidence tending to show the principal's original participation in the agent's act, or that he originally authorized it, although such fact may tend to show malice against the plaintiff on the part of the principal. In such case, the prosecution is not a part of, or connected with the transaction alleged to have been ratified, and the malice, standing alone, is not competent to authorize the inference, that the principal conferred an original or previous authority upon the agent to make the seizure.

25. *Same.*—In such action it is not competent for the plaintiff to show, by way of aggravation of damages, that he had a family, consisting of a wife and several minor children, at the time of the seizure of his goods by one of the defendants.

26. *Trespass; when destitute condition of plaintiff's family, caused by the trespass, not competent evidence.*—Nor is it competent, in such action, to show that the plaintiff's family, then at a distant place, to which plaintiff intended moving, were in a destitute condition as to clothing, bedding or furniture, caused by the seizure of his goods by the defendant, without proof of knowledge by, or notice to the defendant of such condition at the time the goods were seized; but the knowledge of such facts by the defendant, or information charging him with notice thereof, would tend to show an evil motive, such as would constitute a circumstance of oppression or aggravation.

27. *Trespass; good or bad faith an issue, when punitive damages are claimed; what evidence is competent to show good faith.*—Exemplary damages being punitive and preventive in their purpose, as well as compensatory, the good or bad faith of the defendant is always a vital issue where such damages are claimed; and hence, in an action of trespass brought by a mortgagor against a mortgagee and his agent for the seizure

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by the agent of goods under power of sale contained in the mortgage, it is competent for the defendants to show, in mitigation of exemplary damages claimed in the action, that the agent had good reason to believe and did believe, that a part of the mortgage debt remained unpaid, and that the goods seized under the mortgage belonged to the plaintiff, and were conveyed by the mortgage; but such evidence is not admissible in mitigation of actual damages.

28. *Witness; conviction of petit larceny renders infamous and incompetent.*—The conviction of a person for petit larceny before a justice of the peace having jurisdiction, renders him infamous and incompetent to testify as a witness.

29. *Justice of the peace; judgment of conviction in criminal case before; how proved; § 3634 of the Code construed.*—A justice's court not being a court of record, a certified transcript of a judgment rendered therein is not legal evidence, unless so made by statute; and the statute (§ 3634 of the Code) making a certified statement of a justice's judgment presumptive evidence of the fact, having no reference to judgments of conviction in criminal cases, but being limited in its operation to judgments in civil suits, a justice's transcript of a judgment of conviction in a criminal case before him is not admissible in evidence. Such judgment can only be proved by the production of the original papers and docket, sustained by competent evidence of identity, or by sworn copies compared by a competent witness.

30. *Witness; conviction before mayor of Selma for violation of ordinance against larceny, does not render incompetent.*—A conviction of a person before the mayor of the city of Selma for a violation of an ordinance of the city against larceny, does not render him infamous and incompetent as a witness; and such mayor having, under the charter of that city, the jurisdiction of a justice of the peace, in criminal cases, and it not appearing whether such person was convicted by the mayor, sitting *ex officio* as a justice of the peace, of an offense against the State, or whether he was convicted merely of the violation of a municipal ordinance, evidence of such conviction was properly excluded from the jury.

31. *Pleading; what amounts to general issue.*—A defendant can derive no greater benefit from an agreement of parties, that all matters which can be specially pleaded may be given in evidence under the general issue, than he could enjoy under the general issue without such agreement.

APPEAL from the City Court of Selma.

Tried before S. W. JOHN, Esquire, an attorney of the court, selected by the clerk under the provisions of § 18 of Art. VI. of the Constitution, the presiding judge having been, for legal cause, incompetent to try the cause.

This was an action of trespass *de bonis asportatis*, brought by Jasper N. Campbell against John F. Burns and Dick Hill, and was commenced in the Circuit Court of Dallas county on 18th January, 1875. At the spring term, 1876, of said court the plaintiff amended his complaint by adding James H. Burns as a party defendant; and afterwards the cause was transferred to the City Court of Selma. Dick Hill did not appear or defend. James H. and John F. Burns appeared and pleaded the general issue "with leave to give in evidence any matter that might be specially pleaded or replied," and the cause was tried on issue joined on that plea; the trial resulting in a verdict and

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judgment for the plaintiff against all the defendants. The term "defendants," as hereinafter used, applies only to James H. and John F. Burns.

As shown by the evidence, the plaintiff, being engaged in farming on lands rented from James H. Burns, near Burnsville, in Dallas county, on 3d March, 1874, gave his note to the said Burns, who was a commission merchant in the city of Selma, for advances, made and to be made during that year, and, to secure the note and such other advances as he might obtain, he, on the same day, executed a mortgage on his crops, and on a mare, "together with all his effects of every description." The terms and provisions of this mortgage are sufficiently set out in the opinion. A short time prior to 25th December, 1874, after the law-day of the mortgage had passed, plaintiff left home, leaving his family, and went to Montevallo; and on the morning of 16th January, 1875, plaintiff's wife and family left Burnsville, on the train, for Montevallo, his wife having, before she left, requested one Sharpe to haul the household goods of plaintiff, which had been left at their former home, to the depot at Burnsville, and ship them to Montevallo on the evening train. Sharpe hauled the goods, and put them on the platform at the depot for shipment to the plaintiff as requested. After the goods were unloaded and placed on the platform, and while they were there awaiting shipment, in charge of Sharpe, they were seized by defendant Hill, by the direction of John F. Burns, under said mortgage, and were taken off and kept until about 16th March, 1875, when they were sold at public outcry, at Burnsville, at the instance of John F. Burns, under the power contained in the mortgage. These goods "consisted of bed-steads, beds and bedding, literary and school books, men's, boy's, women's and girl's clothing, kitchen furniture, crockery, chairs, etc.; a set of butcher's tools, some jewelry, garden seed, cotton, etc." When hauled to the depot, "the beds were tied up with ropes, the clothing mostly in three trunks, one of which was locked; some of the things [were] in a box, which was nailed up, others in barrels or boxes, which were not fastened up." The evidence tended to show that a part of these goods, "such as crockery, needles, pins, women's clothing, and some ticking, and one feather-bed," were purchased by the plaintiff after the mortgage was executed; that "these things were mixed up with his other goods in the various trunks and other packages;" and that there were also among said goods, so seized and sold, certain articles of personal property, which belonged to the *corpus* of the statutory separate estate of the plaintiff's wife. James H. Burns, who was the father of John F. Burns, was not present at the seizure or sale of said goods, but was then in Selma, where he lived.

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John F. Burns then had possession of said mortgage; but it was not shown by the evidence for the plaintiff that James H. Burns ever instructed John F. Burns to seize or sell said goods.

Against the defendants' objection, the plaintiff introduced evidence tending to show the number constituting his family at the time of the seizure, and the ages and sex of his children; and that when his family left for Montevallo, and when they arrived there, they had nothing with them, except the clothes they wore and a small hand-satchel. To the introduction of this evidence the defendants duly excepted. The plaintiff also read in evidence, against the defendants' objection, a written notice of the sale which was signed by one Edmunds, who was a justice of the peace, and was posted at the instance, as the evidence tended to show, of John F. Burns, and the defendants excepted. The plaintiff, who was examined as a witness, was also allowed to testify, against the defendants' objection, that a day or two after his family arrived at Montevallo, he received a letter from John F. Burns, on the envelope of which was indorsed, in the handwriting of said Burns, and over his signature, the following words; "Get my mare, or I will get you," having reference to a mare which had been advanced to plaintiff, as hereinafter stated, as to the disposition of which by the plaintiff, and whether it had been returned to said Burns or not, there seems to have been a dispute, and there was a conflict in their testimony on the trial. To this ruling of the court the defendants separately excepted.

The defendants read in evidence an account in favor of James H. Burns against the plaintiff for advances claimed to have been made under said mortgage; and he introduced evidence tending to show that it was correct, and that there was a balance still due and unpaid thereon; that the plaintiff had been furnished with a copy of the account about 7th December, 1874; and that he had only objected to one item of \$1.50 for splitting rails, which was corrected. It was shown that payment had been made on the account by sale of cotton delivered to James H. Burns by plaintiff; that a charge of \$26.25 contained in the account was "for commissions on cotton not delivered;" and that another item, on the debit side of the account, of \$85 was for a mare which John F. Burns let the plaintiff have in the spring or summer of 1874, under the following circumstances: "Said John F. Burns had her in possession, and the evidence tended to show that he owned her. The plaintiff proposed to buy her, and it was agreed between John F. Burns and the plaintiff, that the latter should have her for \$85, and John F. Burns testified that the agreement was, that she should be considered as advanced by James H. Burns

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under the said mortgage, if the latter would consent to it, which he soon after did, but the plaintiff denied this. It was further agreed that if the plaintiff was not able to pay for her at the end of the year, he might return her, paying \$20 or \$25 hire for her, and that under this arrangement she was delivered by John F. Burns to the plaintiff." The evidence was conflicting, as to whether or not the plaintiff afterwards returned the mare to John F. Burns. The plaintiff contended that this item was not a part of the debt secured by the mortgage, and should be deducted from the account. He also contended that the item of \$26.25 for commissions, above mentioned, was usurious; and was allowed by the court, against the defendants' objection, to introduce evidence tending to show that there was usury in that and in other charges contained in the account, for the purpose of reducing the amount thereof, and of showing, in connection with the payments he had made thereon, that the mortgage debt had been paid. To the introduction of this evidence the defendants duly excepted. He was also allowed to introduce, against the defendants' objection, evidence tending to show that some of the articles charged on the account were purchased by James H. Burns at wholesale, and were charged against the plaintiff at higher prices than he paid for them, and the defendants excepted. He was also allowed to introduce, against the defendants' objection, evidence tending to show that the cotton which plaintiff delivered to James H. Burns, was sold by brokers employed by said Burns at a less rate than was charged on said account, and than he had stipulated in said mortgage to pay; and the defendants excepted.

The plaintiff was also allowed, against the defendants' objection, to read in evidence an affidavit made by James H. Burns, dated 18th January, 1875, charging that the plaintiff "did on or about the 12th day of January, 1875, sell, convey, or willfully destroy" a certain mare, two bales of cotton, and some cotton seed, on which said Burns had a mortgage; also a warrant issued by the justice of the peace for said offense, based on said affidavit; and also "proceedings in said case showing that the plaintiff was bound over in a bond of \$200, to answer said charge." To the introduction of this evidence the defendants duly excepted.

The plaintiff offered to examine as a witness on his behalf the defendant Hill, and thereupon, the defendants, James and John H. Burns, for the purpose of showing that said witness was not competent to testify, offered to the court a certified transcript of the conviction of said Hill for the crime of petit larceny before a justice of the peace. To this transcript the plaintiff objected, and his objection was sustained, and the defendants excepted. For the same purpose the defendants also

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offered "a book which was proven to be the record of criminal cases tried by the mayor of the city of Selma," to show that said Hill had also been convicted before said mayor of larceny; but the plaintiff objected, his objection was sustained, and the defendants excepted. Thereupon said Hill was examined as a witness by the plaintiff.

Both James H. and John F. Burns were examined as witnesses on their own behalf. They testified, in substance, that the former gave the latter no authority or instructions to seize or sell any of said goods; that he never ratified, confirmed or adopted the seizure of said goods in any manner, shape or form; that he never, directly or indirectly, derived or claimed any benefit from the seizure or sale thereof; and that he did not know that John F. Burns intended to make any seizure. The defendant James H. Burns offered to prove by John F. Burns that a few days after the seizure, John F. met James H. Burns and told him about it; and that thereupon the latter told John F. Burns not to keep the goods, but to return them to plaintiff. The plaintiff not being present at this conversation, he objected to the testimony, and his objection was sustained, and the defendants excepted. The defendants also offered to prove by James H. Burns, that "the first time he heard of the seizure of said goods, he told the man who informed him of it, to tell John F. Burns to have nothing to do with said goods, the plaintiff not being present." To this testimony the plaintiff objected; his objection was sustained, and the defendants excepted. James H. Burns was also asked this question by his counsel: "When you first heard of the seizure, did you approve or disapprove of it." To the question the plaintiff objected; his objection was sustained, and defendants excepted. John F. Burns was asked this question by his counsel: "Did you believe that the goods were covered by the mortgage." To the question the plaintiff objected; his objection was sustained, and the defendants excepted. The evidence for the defendants also tended to show that the mortgage was given to John F. Burns, because the plaintiff had asked James H. Burns not to enter the charge for the mare which he had obtained from John F. Burns on the account, stating that he would settle that item with John F. Burns, and that he intended to return the mare.

The defendants "separately and severally, each for himself," reserved exceptions to the following, among other, instructions embodied in the general charge of the court to the jury: (1) "If James H. Burns bought the goods which he sold or advanced to Campbell at or about the time he sold or delivered them to Campbell, he is entitled to charge only what he paid for the goods." (2) In substance, that if the jury believed

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from the evidence that the mare which plaintiff obtained from John F. Burns, was, at the time it was delivered to him, the property of John F. Burns, then the price of the mare was not covered or secured by the mortgage; and that no agreement or understanding between James H. and John F. Burns could extend the lien of the mortgage over the property of the plaintiff, to secure the debt he owed John F. Burns individually therefor; and that if they should find that the mare was then the property of John F. Burns, they should strike the charge therefor from the account. (3) "If you find from the evidence that James H. Burns has charged Campbell more than he actually paid for selling the cotton [delivered to him by Campbell], and that he deducted this overcharge from the gross proceeds of the cotton, you should give Campbell credit for the excess, by adding the amount of the excess to the credit side of the account." (4) In substance, that if they find from the evidence that the item of \$26.25, charged for commissions, was usurious, they should strike it from the debit side of the account; and that if they found that any other items of the account were tainted with usury, they should strike from the account the interest charged thereon. (5) In substance, that if, after stating the account under the rules laid down, the jury find that the mortgage debt was fully paid to James H. Burns by the plaintiff, the mortgage was extinguished and did not give any authority whatever for the seizure of plaintiff's goods. (6) "If James H. Burns was interested or concerned in the unlawful taking of plaintiff's goods, or commanded the taking of them by his agent, then he would be as guilty as though personally present, taking the goods with his own hands." (7) "If James H. Burns' agent unlawfully took plaintiff's goods for James H. Burns' use or benefit, and James H. Burns, on learning of the trespass, approved of it, or agreed to it, or ratified the wrongful act, then he would be guilty." (8) It was the duty of James H. Burns, "when he learned of the seizure, if he did not intend to ratify it, to use all lawful means to restore to plaintiff the goods taken from him, and to re-assert his control over the mortgage deed, and deprive his agent of its possession and use; and, if in fact it had been paid, to surrender and cancel it, so that it could not be used by his agent in seizing and selling plaintiff's goods. If he did not discharge this duty fully, promptly, and in good faith, then you may look to that dereliction, coupled with all the other evidence on the subject, to ascertain whether he, in fact, ratified the unlawful taking of plaintiff's goods." (9) "If the jury believe that a trespass was committed by the defendants, John F. Burns and Dick Hill, and that it was done by James H. Burns' agent for James H.'s use and benefit, but that said James H. did not

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ratify the trespass until after this suit was begun, still, if the jury believe that, after he was informed of the trespass, he acquiesced in, ratified, or agreed to the trespass, he would be guilty; and in determining this question, the jury should look to all the evidence in the cause, whether of acts or declarations, occurring before or after the trespass, or before or after the suit." (10) In substance that, in arriving at the amount of damages the jury should take into consideration the condition in which the plaintiff and his wife and children were left at the season of the year, when the goods were taken, "by the taking from them of the articles which the evidence may show, were taken by the defendants." (11) In substance, that the possession of the goods by Sharpe at the depot was the possession of the plaintiff. Exceptions were also reserved to portions of the general charge touching the recovery of vindictive damages, which need not be set out.

The defendants also separately reserved exceptions to the refusal of the court to give the following, among other, charges, requested by them in writing: (1) "That the mortgage of the plaintiff to James H. Burns, introduced in evidence, by its terms and provisions, covered and included all the property and effects of the plaintiff, of every character and description; and if the jury believe from the evidence that the goods and chattels in controversy belonged to the plaintiff, and were taken under said mortgage, and by authority of James H. Burns; and that at the time they were taken, as shown by the testimony, there was any balance of the mortgage debt, however small, remaining unpaid, then the jury must find for the defendants." (2) "That until the mortgage debt was fully paid, it was the duty of the plaintiff to keep and preserve the mortgaged property separate and distinguishable from other property, so that it could be identified; and if the jury believe from the evidence that other articles and goods were mixed and commingled with the mortgaged property by the plaintiff or his agents, so that such other articles and goods could not be distinguished or separated from the mortgaged property at the time of the seizure, and that under these circumstances, and after the law-day of the mortgage, and while a balance on the mortgage debt remained unpaid, the goods and chattels in controversy, while so commingled, were taken under said mortgage, and by authority of the mortgagee, James H. Burns, then the plaintiff can not recover in this action, either for the mortgaged property, or for the other articles so commingled therewith." (3) In substance, that, if any property belonging to the *corpus* of the statutory separate estate of the plaintiff's wife was seized, the plaintiff could not recover damages for seizing such property. (4) "If James H. Burns rendered or

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furnished a copy of his account on his books to the plaintiff, and if some days afterwards plaintiff said to Burns that the item of \$1.50 for rails in said account was incorrect; and if that was the only item objected to, this amounts to an admission that each and every other item in said account was correct." James H. Burns also reserved exceptions to the refusal of the court to give the following, among other, charges, requested by him in writing: (1) "A principal is never liable for the unauthorized and willful act or trespass of his agent. (2) A trespass can not be committed by mere inaction; and if the defendant, John F. Burns, committed a trespass in taking the goods and chattels in controversy, the mere inaction, or failure, or inability of James H. Burns to compel the restoration of said goods and chattels, would not make him liable or responsible for the trespass." (3) "A principal is never liable for the unauthorized, willful, intentional, and malicious acts or trespasses of his agent; and if the jury believe from the evidence that John F. Burns committed a willful, intentional, or malicious trespass upon the plaintiff, by taking goods and chattels which he was not entitled to take under the mortgage, or otherwise, then James H. Burns would not thereby be liable or responsible for such willful or malicious trespass."

The defendants also excepted to the following charge, given at the request of the plaintiff: "If the jury believe from the evidence that the plaintiff acquired any of the goods and chattels described in the complaint, subsequently to the date of the execution of the mortgage executed by the plaintiff to James H. Burns; and that the said goods and chattels, so acquired, were taken by the defendants, then the said mortgage afforded the defendants no defense for taking the said goods and chattels, so subsequently acquired."

The rulings of the City Court above noted are among the errors assigned in this court.

BROOKS & ROY and WHITE & WHITE, for appellants.—(1) If any thing was due on the debt at the time of the seizure, Burns, under his mortgage, had the right to take all of the property conveyed thereby.—*Morrison v. Judge*, 14 Ala. 182; *Bell v. Pharr*, 7 Ala. 807. (2) If Campbell desired to raise the question of usury, he should have filed a bill in equity; and then he would have been compelled to pay lawful interest. He will not be allowed to hold still and treat the defendants as trespassers, for collecting the debt according to the terms of his own contract, which was, at best, only voidable, and which he had never repudiated.—*Pearson v. Bailey*, 23 Ala. 537; *McGehee v. George*, 38 Ala. 323; 1 Jones on Mort. § 640; *Eslava v. Crampton*, 61 Ala. 507. (3) Retaining an account

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for a length of time without objection, is an admission of its correctness.—*Langdon v. Roane*, 6 Ala. 518. (4) The agreement between John F. Burns and the plaintiff in reference to the mare which said Burns let plaintiff have, when it was ratified by James H. Burns, became a parol mortgage of the mare to James H. Burns, which was valid and binding between the parties to this suit.—*Morrow v. Turney*, 35 Ala. 131; *Brooks v. Ruff*, 37 Ala. 371; *Shelburne v. Letsinger*, 52 Ala. 96; *Bickley v. Keenan*, 60 Ala. 293. (5) James H. Burns ought to have been allowed to prove that when told by John F. Burns of the seizure, he told him not to keep the goods, but to return them. There is no evidence that James H. Burns authorized, or even knew of the seizure, when it was made, but he was sought to be charged in consequence of a subsequent adoption, or ratification. These declarations were a part of the act itself, *then done*, and ought to have been admitted as explanatory of it. Besides, these words constituted the *very act* of repudiation, which he had a right to prove. (6) To maintain trespass, the plaintiff must have the actual possession, or the immediate right of possession.—*Ledbetter v. Blussingame*, 31 Ala. 495. (7) It is a rule of law that the cause of action must exist at the time the suit is begun. When this suit was brought, the plaintiff had no right of action whatever against James H. Burns. While he may have made himself liable for the trespass by a subsequent ratification, such ratification must antedate the commencement of the suit. (8) The principal is not liable for the willful and malicious trespass of his agent, though done in the course of the principal's business.—*Bondurant v. Bank*, 7 Ala. 830; *Kirksey v. Jones*, 7 Ala. 622; 1 Brick. Dig. pp. 61-2, §§ 133-4. (9) The ratification by the principal of a trespass committed by his agent, will not make him responsible, unless it is ratified with full knowledge of all the facts. 2 Add. on Torts, 1122; *Adams v. Freeman*, 9 Johns. 116; 1 Wat. on Tres. § 28; *Home Machine Co. v. Ashley*, 60 Ala. 496. (10) If Campbell mixed the mortgaged property with other property belonging to him, not covered by the mortgage, that also becomes liable.—11 Met. 493; 2 Johns. Ch. 108; 2 Kent's Com. m. pp. 364-5. (11) If Campbell was not in the actual possession of the goods, and some of them belonged to the statutory separate estate of the wife, she, and not he, could sue for their taking.—Code of 1876, §§ 2371, 2525; Brick. Dig. p. 33, § 205; 52 Ala. 78; 29 Ala. 532; 31 Ala. 447. (12) The mortgage covered after-acquired property; and the legal title to such property resided in the mortgagee so soon as it was acquired; and Burns had the same right to seize it under the mortgage as he did the other property conveyed.—*Thrash v. Bennett*, 57 Ala. 156, and authorities cited. (13) It is the

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evil intention which gives the right to exemplary damages. Sedg. on Dam. m. p. 455. (14) When smart money is claimed, evidence of acts done at a different time and place, and which in themselves constitute a cause of action, is not admissible. It is confined to matters of aggravation attending the act.—2. Brick. Dig. p. 475, §§ 81-5; 27 Ala. 480; 17 Ala. 391; 28 Ala. 236; 9 Bacon's Abr. 543, 549.

PETTUS, DAWSON & TILLMAN and JOS. F. JOHNSTON, *contra*. (No brief came to the hands of the reporter.)

SOMERVILLE, J.—The present case is an action of trespass, brought by a mortgagor against the mortgagee and another, for taking possession of certain personal property, under a power of sale contained in the mortgage. The seizure was made in January, 1875, after the law-day of the mortgage, by order of the defendant, John F. Burns, acting as the agent of his father, James H. Burns, who is shown not to have originally authorized the act, but who is sought to be made liable upon the ground of a subsequent ratification.

1. At the time of this transaction, the principle of law prevailing in this State was, that a mortgagee of chattels could sustain an action of detinue for them after default, if any portion of the mortgage debt remained unpaid. His right to recover could only be defeated by showing payment or discharge of *the entire debt*.—*Morrison v. Judge*, 14 Ala. 182; *Bell v. Pharr*, 7 Ala. 807. It is immaterial that this principle has been since modified by legislation, so as to authorize the defendant to put in issue, in such cases, the amount due on the mortgage debt.—Session Acts, 1880-81, p. 39. If the mortgagee would be entitled to sue in detinue under such circumstances, the right must be based upon a general or special property in the goods sought to be recovered, coupled with the right of immediate possession.—*Gafford v. Stearns*, 51 Ala. 434; 1 Chitty's Plead. 121.

If, therefore, at the time the mortgagor's goods were seized, there remained *any part* of the mortgage debt unpaid, the mortgagee's right to take possession of *the whole* of the mortgaged property under the power of sale granted in the instrument, would not be affected by reason of the partial payments previously made, unless such be the fair inference from the language of the mortgage. In the present case, we discover no words or language qualifying or limiting the general power to take possession of the entire property, after default.

2. It was not competent for the plaintiff, in this action of trespass, to assail the mortgage debt for *usury*. Usurious contracts in this State are not absolutely void, but merely *voidable*

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to the extent of the interest.—Code of 1876, § 2092. The defense must be specially pleaded, and is not available under the general issue.—*Masterson v. Grubbs*, 70 Ala. 406; *Munter v. Linn*, 61 Ala. 492. If a debtor elect to avoid a debt for usurious taint, he may do so, by special plea, in a suit brought by the creditor to recover judgment against him for the enforcement of the debt (Code of 1876, §§ 2092, 3010,); or he may, in a proper case, resort to a court of equity and obtain relief upon condition of paying the principal and legal rate of interest. *McGehee's Adm'r v. George*, 38 Ala. 323; *Uhfelder v. Carter's Adm'r*, 64 Ala. 527. But usury in a debt secured by mortgage, does not affect the validity of the mortgage, and is not available, at law, in an action founded on the mortgage.—*Kelly v. Mobile B. & L. Association*, 64 Ala. 501; *Bradford v. Daniel*, 65 Ala. 133.

The mortgage executed by plaintiff to James H. Burns, one of the defendants, was introduced in the present case as evidence of defendant's title to the property seized under it. Neither the mortgagee, nor his agents, could be made trespassers by an effort on plaintiff's part to collaterally assail the mortgage debt as usurious, thus imparting retrospective operation to an election as to usury thus irregularly made. All the evidence, which was admitted in the trial below looking to this end, was irrelevant, and should have been excluded.

3. It is contended that the mortgage debt has been entirely extinguished by the proceeds of certain cotton shipped by the mortgagor, Campbell, to the mortgagee, Burns, and sold by the latter, or under his authority, as a cotton factor and commission merchant. If this be true, and the fact be shown satisfactorily by the evidence introduced on the trial, then such payment would discharge the mortgage, and entirely extinguish the lien intended to be secured on the property conveyed by it. Herman on Chat. Mort. § 168; *Dryer v. Lewis*, 57 Ala. 551. In such event the mortgagee would be chargeable as a trespasser, if he sought, either through himself or his agent, to seize the mortgaged property, for he could not show title under a satisfied mortgage, or justify taking possession under a power conferred by it.

The mortgage in question was executed by the appellee on March 3, 1874, and was given to secure a note for one hundred and twenty-five dollars, payable to James H. Burns, October 1, 1874; also such advances as Burns, the mortgagee, might make to Campbell, the plaintiff, during the year, to enable him to cultivate certain lands, including commissions of two and a half per cent. for selling certain cotton agreed to be shipped by plaintiff to Burns. It conveyed all the mortgagor's crop of cotton and corn, to be grown during the current year in Dallas

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county, together with "*all his effects of every description*," including one sorrel mare described by name. In ascertaining whether the mortgage debt was paid or not, which was a vital issue in the case, it was of course competent to investigate the account of Burns as rendered against Campbell. The proceeds of the cotton, which was subject to the lien of the mortgage, less all proper charges against it, would be a fund in the hands of the mortgagee, which the law, in the absence of a contrary agreement, would appropriate to the payment of the mortgage debt.—*Schiffer v. Feagin*, 51 Ala. 335. Among these proper charges, liable to be deducted, would be included the commissions agreed to be paid for selling the cotton; and no collateral investigation into their usurious character could be permitted in this action.

4. For all articles of merchandise, advanced by Burns to Campbell, he was entitled to charge such prices as may have been agreed on; or, in the absence of any agreement, a fair and reasonable market valuation, as estimated at the time and place of sale. What the prices of the goods were, as paid by Burns at wholesale purchase, at another time or place, was entirely immaterial. Fair and honest dealing is all that the law exacts from the mortgagee, under such circumstances, in his transactions with the mortgagor. While it is his duty, on the one hand, not to *oppress*, he is, on the other, under no obligations to *confer benefactions*.

5. If a debtor, to whom an account is rendered, either admits its correctness, or retains it and makes no objection within a reasonable time, he will be bound by it as an *account stated*, his silence, in the latter case, being presumptively construed into an acquiescence in its justness.—*Langdon v. Roane's Adm'r*, 6 Ala. 518. So if *one item only is objected to*, this is an admission of the correctness of the other items to which no objection is interposed.—2 Greenl. Ev. § 126; *Chisman v. Count*, 2 M. & Gr. 307. If, therefore, Burns rendered his account to Campbell, as the evidence tends to show, and the latter, several days afterwards, objected only to the item charged for *rails*, this would be an implied admission of the correctness of the rest of the account.

6. It was no valid objection to the correctness of the account that one of the items advanced to plaintiff by the mortgagee, James H. Burns, was a horse belonging to John F. Burns, provided the latter consented to such disposition of his property. And even though the transaction was the execution of a mere agency, no one but the principal could interfere to prevent the enforcement of the contract in the agent's name, whether by suit or otherwise.—Bishop on Contracts, § 356; 1 Brick. Dig. p. 67, §§ 225 *et seq.* And the agreement between the parties, that

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the written mortgage already executed should be extended so as to cover the horse, would at least be so far valid as to operate, *inter partes*, as a *parol* or *verbal mortgage*, without prejudice to the rights of creditors or purchasers not having notice. *Brooks v. Ruff*, 37 Ala. 371; *Gafford v. Stearns*, 51 Ala. 434; Herman on Chat. Mort. §§ 19, 27.

7. Nor was it a matter of concern to Campbell, that the mortgagee, who was a commission merchant, employed the services of a broker to sell the cotton consigned to him, and procured such sale to be made at a commission less than that agreed to be paid by Campbell. The legal maxim, that an agent can not delegate his authority to a sub-agent, has no application to such a case. It can be invoked only by the principal when sought to be charged by the act of the sub-agent. *Harralson & Co. v. Stein*, 50 Ala. 347; Ewell on Agency (Evans's Ed.), p. 53, *note*. The plaintiff does not here seek to disavow the act of the sub-agent, the broker, in selling his cotton; nor is there any effort made to impugn his skill or faithfulness. The contention relates only to the compensation for services charged by *the agent*. The maxim in question, furthermore, does not prohibit the employment of *subordinates*, but rather of *substitutes*.

8. The circumstances under which a mortgagee may take possession of personal property conveyed by the mortgage, under authority of a power of sale conferred by the instrument, are fully discussed in the case of *Street v. Sinclair*, *ante*, p. 110. It was there held that, after default, he could execute the power by entering upon the premises of the mortgagor and taking peaceable possession of the mortgaged property, without consent of the mortgagor, provided he thereby committed no breach of the peace. We have no disposition to depart from the doctrine of that case.—Herman on Chat. Mort. p. 209, § 96; *McNeal v. Emerson*, 15 Gray, 384; *Satterwhite v. Kennedy*, 3 Strob. 457; *London Co. v. Drake*, 6 C. B. (N. S.) 798. The evidence here shows that the mortgaged goods were on the platform of the railroad depot ready to be shipped to Montevallo in another county. They are shown to have been in the custody of one Sharpe who had acted as cartman in hauling them to the depot by request of plaintiff's wife. It is not shown that he either consented or objected to the seizure under the mortgage. Under these circumstances, if any portion of the mortgage debt remained unpaid, an agent of the mortgagee could lawfully take possession of the mortgaged property without becoming a trespasser, if he in no manner subjected himself to a violation of the criminal law. Jones on Chat. Mortg. § 434; *Nichols v. Webster*, 1 Chand. (Wis.) 203; *McNeal v. Emerson*, 15 Gray, 384; Herman on Chat. Mortg. § 96, *supra*.

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9. The evidence tends to prove that the *mortgaged goods were commingled* with some of the *property of the mortgagor's wife*, and with *after-acquired* property of the mortgagor himself, which, it is insisted, the mortgagee had no lawful right to seize. According to the ordinary principle governing *confusion of goods*, if the goods of one person be willfully, or, through want of proper care on his part, so mixed or confused with the goods of another that they can not be distinguished, the latter is entitled to the whole, unless he consented to the act.—Walker's Amer. Law (5th Ed.) 343; *Smith v. Sanborn*, 6 Gray 134. And this doctrine applies to mortgaged goods, such *confusion* making the whole, *prima facie* at least, subject to the lien and operation of the mortgage.—Herman on Chat. Mort. p. 84, § 43; *Hamilton v. Rogers*, 8 Md. 301.

10. Supposing that there was no confusion of goods within the above rule, it is still insisted by appellant's counsel that *the after-acquired property* of the mortgagor, Campbell, passed to the mortgagee under the express terms of the mortgage. The granting clause conveys "all my [the mortgagor's] effects of every description." The *habendum* clause authorizes the mortgagee to take possession of "the above described property, or *any other effects* of mine [the mortgagor's] wherever found." The principle has been often decided in this State that property having a potential existence can be the subject of a valid grant, sale, or mortgage. An owner or tenant of land, for example, may mortgage a crop not *in esse*, and to be planted and grown *in futuro* on such premises, but such a conveyance creates only an *equitable title*, as distinguished from a legal one.—*Grant v. Steiner*, 65 Ala. 499, and cases cited. If a tenant should mortgage such crops as might be raised or grown by him on some indefinite place which he expected to rent, the conveyance would, we apprehend, be inoperative and void, as an attempted conveyance of a mere possibility or expectancy, not coupled with any interest in, or growing out of property.—*Skipper v. Stokes*, 42 Ala. 255; *Purcell v. Mather*, 35 Ala. 570; *Booker v. Jones*, 55 Ala. 266. The maxim applies "*qui non habet, ille non dat.*" So a mortgage of subsequently acquired property, especially by general terms of description, which is not the product, increase or accretion of something already owned by the mortgagor, amounts to nothing more than a mere agreement to give a further mortgage. It confers no specific lien on such after-acquired property.—Herman on Chat. Mort. § 46; *Anderson v. Howard*, 49 Ga. 313; *Otis v. Sill*, 8 Barb. 102; 2 Kent's Com. 468.

11. The court allowed proof of damages in the present case for certain articles of personalty belonging to the *wife* of the plaintiff, as a part of her statutory separate estate, which were taken at the same time with the plaintiff's property. In the

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admission of this evidence, we are of opinion, there was error. It is true that the *gist* of the action of trespass is an injury to the plaintiff's possession. But the possession of the husband, so far as concerns the wife's statutory separate estate, is generally referred to his representative capacity as her trustee, and in the absence of an actual custody by him, the general property in the wife would certainly draw to it the possession, where there is no intervening adverse right of enjoyment. Be this as it may, the action here has reference to the *corpus* of the wife's property as distinguished from its *use*. The claim is for damages in taking the property itself, and no question arises as to the rents, income and profits as such. Where this is the case, the statute has been construed to require the wife to sue alone.—Code, § 2892; *Pickens & Wife v. Oliver*, 29 Ala. 528. It has been held by this court that, under the provisions of the Code, the wife may sue alone in *trover* for her statutory separate estate.—*McConeghy v. McCaw*, 31 Ala. 447. So she may likewise sue in an action of *unlawful detainer*, as decided in *Hurst v. Thompson*, 68 Ala. 560.

12. The present suit was instituted prior to the time of the alleged ratification of the agent's act, or trespass, by the principal. If the principal, James H. Burns, adopted the agent's act, this adoption was not until *after the suit was commenced* against the latter. Did the court err in admitting the principal to be made a party by amendment of the complaint so as to charge him in this action, the original action being only against the agent? The statute authorizes the amendment of the complaint by striking out, or adding either new parties plaintiff, or new parties defendant, upon such terms and conditions as the justice of the case may require.—Code, 1876, § 3156. This statute must, of course, be construed to mean that only such parties defendant may be added as were liable in the given cause of action at the time the summons was issued, which is the commencement of the suit.

There is no difficulty about the general rules of law governing the ratification of an agent's unauthorized act by a principal. It is settled that where such an agent, acting *in the name and for the benefit of his principal*, commits an unindictable trespass *de bonis asportatis*, or, in other words, a trespass which is voidable merely and not wholly void, as imposing a civil and not a criminal liability upon the perpetrator, the principal, after being fully informed of its tortious nature, may adopt it as his own act, and such ratification ordinarily binds the principal to the same extent, and holds him to the same civil responsibilities as if he had originally authorized it. And for many purposes the ratification will relate back to the date of the unauthorized act so as to constitute the principal a tres-

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passer *ab initio*.—Ewell's Evan's Agency, *64, *70-71; Coke's Inst. IV, 317; 1 Brick. Dig. p. 59, § 91; *Blevins v. Pope*, 7 Ala. 371; Story on Agency, §§ 239, 244; *Chapman v. Lee*, 47 Ala. 143; *Mound City Ins. Co. v. Huth*, 49 Ala. 529; 1 Waterman on Trespass, § 28. This, however, is upon the *doctrine of relation*, which is a mere legal fiction, having its origin in necessity, and which is never allowed to prevail except for the advancement of right and justice.—*Jackson v. Ramsay*, [3 Cow. 75.] 15 Amer. Dec. 242, 246; *Pierce v. Hall*, 41 Barb. 142; *Menvill's case*, 13 Co. 19. It can not be applied so as to authorize one to be made a party defendant to a suit, by amendment, when the act creating his liability was done after the suit was instituted. All pleas setting up defenses to an action have reference to the time when the action was commenced, excepting pleas to the further maintenance of the action, and pleas *puis darrien continuance*. If a defendant be not liable on the date when the suit is commenced, he can not be made liable at all *in that action* by any subsequent act of adoption or ratification. To create such retrospective liability, with its attendant costs and consequences, would be to pervert the doctrine of relation to an unjust and improper end.

If James H. Burns, therefore, did not originally authorize the alleged trespass, and did not adopt or ratify it until after this action was brought against John F. Burns, he could not be made a party defendant by amendment of the complaint, as seems to have been done in the court below, at least so as to make him chargeable in this action.—*Donaldson v. Waters*, 30 Ala. 175.

13. But to hold the principal responsible for damages, in such cases, it must appear that he ratified the wrongful act of the agent with a full knowledge of its tortious character.—*Street v. Sinclair*, *supra*; *Lienkauf v. Morris*, 66 Ala. 406. The mere appropriation of the fruits of the trespass, without such knowledge, would not be sufficient.—*Herring v. Skaggs*, 62 Ala. 180.

14. Where the relation of agency exists, and the principal derives a benefit from an act beyond the scope of the agency, the principal will be held to have ratified such unauthorized act by *acquiescence*, if, after being fully informed of what has been done, he fails to express his dissatisfaction within a reasonable time.—*M. & M. Railway Co. v. Jay*, 65 Ala. 113. There are many cases, however, where mere silence, or non-interference will not amount to a ratification.—Whart. Agency, § 86; 2 Greenl. Ev. § 66. Where the relation of agency does not exist when the act is done, but the act is that of a mere volunteer awaiting ratification, the silence of the principal will not be so readily construed into a ratification, unless, perhaps, in

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cases where it might operate to the prejudice of innocent parties.—*Saveland v. Green*, 40 Wis. 431; *Ward v. Williams*, 26 Ill. 451.

15. It was clearly competent to prove the declarations of James H. Burns, on being first informed of the seizure of the goods, ordering them to be returned to the plaintiff, and also the message to his acting agent, instructing him to have nothing more to do with them. They were in the nature of verbal acts and tended to show a repudiation of the agent's act.—*Moon v. Towers*, 8 C. B. (N. S.) 611; *Henderson v. The State*, 70 Ala. 23.

16. The question propounded to the witness, however, whether, on being first informed of the seizure, "he *approved* or *disapproved* of it," would be irrelevant, if propounded with the view of eliciting a mere *mental* approval, unaccompanied with acts or words. The meaning of the interrogatory being ambiguous, and it not affirmatively appearing whether the answer would have been legal or illegal evidence, we can not say the court erred in disallowing it.—*Stewart v. The State*, 63 Ala. 199.

17. If the defendant James H. Burns, in good faith, and by suitable acts and declarations, repudiated the seizure made by his son, the law would not make it incumbent on him to actively interfere to compel restoration of the goods to the plaintiff, unless they had come into his custody, or under his control. His failure to counsel restoration, however, or to re-assert control over the mortgage under which the seizure was made, could be looked at by the jury, if satisfactorily proved, as tending, in connection with other facts, to prove acquiescence, being weaker or stronger evidence to this end according to circumstances. The law, however, requires, with good reason, "substantial proof of a ratification" in all cases of trespass.—*Ewell's Agency*, *64.

18. The written notice of the sale, and the sale itself, of the mortgaged goods were but cumulative evidence of the intention of the party taking the goods, and as such a part of the *res gestæ* of the alleged trespass. It was, therefore, properly admitted in evidence, in the nature of an admission, and as shedding light on the dominion over the goods previously asserted.

19. The measure of damages in actions for trespass to goods, where the taking is unlawful without more, is generally *the value of the goods*, or the amount of injury done to them, as the case may be, *with interest* to the date of judgment.—*Lienkauf v. Morris*, 66 Ala. 406.

20. But when the taking is perpetrated in a rude, wanton, reckless, or insulting manner, or is accompanied with circum-

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stances of fraud, malice, oppression or aggravation, or even with gross negligence, the party injured is entitled to recover exemplary damages. These principles are too well settled to require discussion.—*Lienkauf v. Morris*, 66 Ala. 406; *Hair v. Little*, 28 Ala. 236; *Roberts v. Heim*, 27 Ala. 678; *Devaughn v. Heath*, 37 Ala. 595; *Parker v. Wise*, 27 Ala. 480; *Durr v. Jackson*, 59 Ala. 210; *S. & N. R. R. Co. v. McClendon*, 63 Ala. 266.

21. The rule is, that, where several defendants are sued in *tort* for damages, the malice or other evil motive of *one* can not be matter of aggravation, or ground for vindictive damages against the *other*.—Wood's *Mayne on Damages*, p. 594, § 624. Hence, principals are not generally held liable for such damages by reason of the evil motive of an agent, unless the act of the agent was fully ratified with a knowledge of its malicious, aggravating, or grossly negligent character; or these matters of aggravation were probably consequent on the doing of the wrongful act ordered by the principal; or unless the agent was employed with a knowledge of his incompetency.—*Leinkauf v. Morris*, 66 Ala. 406, 415; *Pollock v. Gantt*, 69 Ala. 373; *Kirksey v. Jones*, 7 Ala. 622; *Fields' Law Damages*, §§ 86, 87; *Woods' Mayne on Dam.* p. 57, § 48; *Carmichael v. W. & L. Railway Co.* 13 Ir. L. R. 313.

22. The *letter* signed John F. Burns, bearing date January 16, 1875,—the day of the seizure of plaintiff's goods—which is shown to have been received by the plaintiff through due course of mail, would be relevant against the author, if satisfactorily proved to have been in his handwriting, or shown to have emanated from him. Its contents evince an unfriendly feeling, and it was competent to show malice or an evil motive on the part of the writer, which may have entered into, or given color to the present transaction. And the same may be said of the *endorsements* on the envelope.—1 Greenl. Ev. § 53.

23. It was not competent, however, to introduce in evidence the record of the criminal prosecution instituted by James F. Burns against the plaintiff, about the time of the seizure. We find no evidence in the record tending to show that he originally authorized the alleged trespass, and, if liable at all, it is upon the ground of his having ratified the act of an agent. All evidence relating to damages "must be confined to the *principal transaction* complained of, and to *its attendant circumstances* and natural results; for these alone are put in issue."—2 Greenl. Ev. § 268. It is true that the commencement of such a prosecution may have tended to show malice against the plaintiff on the part of the prosecutor, but it could not constitute a circumstance of aggravation accompanying the taking, in the absence of all evidence of original participation

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in the act by the prosecutor. It could not be a part of the transaction alleged to be ratified, because it had no connection with it. Nor could such malice, standing alone, authorize the inference that the principal conferred an original or previous authority upon the agent to make the seizure.

24. The court erred in allowing proof to be made, by way of aggravation of damages, that plaintiff had a *family*, consisting of a wife, and several minor children, such evidence being irrelevant to the issues on trial. Nor would it be competent to show their condition as to clothing, bedding, or other apparel or furniture, while at Montevallo, without proof of knowledge or notice on the part of John F. Burns, at the time he seized the property in question, in which were included articles of the above description. The knowledge of such facts, or any information charging him with notice of them, would have a tendency, however, to show an evil motive, such as to constitute a circumstance of oppression or aggravation.

25. The consideration of *motive* is always of the highest importance as affecting the question of exemplary or vindictive damages. *Good or bad faith*, therefore, constitutes a vital issue in all cases of trespass, where such damages are claimed, although it may have no bearing on the question of *actual* damages. Exemplary damages are both punitive and preventive in their purpose, as well as compensatory. They are not only intended to compensate the plaintiff for his actual loss, but are also inflicted "for example's sake, and by way of punishing the defendant."—Sedg. Dam. 459, 464; *Lienkauf v. Morris* 66 Ala. 406, *supra*; *Kirksey v. Jones*, 7 Ala. 622. Hence, in such cases, it is competent to show that the defendant acted with *the honest belief* that he owned the goods, or had a lawful right to take them.—*Hawk v. Ridgway*, 33 Ill. 473; *Hillman v. Baumbach*, 21 Tex. 203; *Green v. Craig*, 47 Mo. 90; Woods' Mayne on Dam. pp. 58–59, 519. It was permissible, under this principle, to prove that John F. Burns had good reason to believe, and did believe, that a part of the mortgage debt remained unpaid, and that the goods seized under the mortgage belonged to the plaintiff and were included in the mortgage. But this evidence would be admissible only in mitigation of exemplary, and not of actual damages.

26. In the case of *Sylvester v. The State*, *ante*, p. 17, we held that a conviction of the offense of petit larceny renders a witness infamous, and, therefore, incompetent to testify in a court of justice. Where the value of the property stolen does not exceed the sum of ten dollars, justices of the peace, in their respective counties, have jurisdiction of the offense, to be exercised concurrently with the county courts.—Code, § 4628; Clark's Man. Cr. L. § 1862. The witness, Hill, was, therefore,

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rendered incompetent, on proper proof being made of his conviction of the offense of petit larceny by a justice's court having jurisdiction.

27. A justice's court not being a court of record, a *certified transcript* of a judgment rendered by it is not legal evidence, unless made so by statute, and this is not authorized except as proof of judgments rendered in civil causes. Section 3634 of the Code, making a certified statement of a justice's judgment presumptive evidence of the fact, clearly has no reference to judgments of conviction in *criminal* causes, but must be confined to civil proceedings. When it is desired to prove a judgment of conviction, or other criminal proceeding, it may be done by producing the original papers and docket, sustained by competent evidence of identity, and accompanying proof of their verity.—*Kennedy v. Dear*, 6 Port. 90; *Scott v. McCrary*, 1 Stew. 315; Freeman on Judgt. § 410. Or such proceedings may be proved by *sworn copies* of them, compared by any competent witness.—*Jones v. Davis*, 2 Ala. 730. Under these views the court did not err in sustaining plaintiff's objection to the admission of the justice's transcript, which was not self-proving.—*Watson v. The State*, 63 Ala. 20.

28. Nor can we see that the court ruled erroneously in excluding the book which was proved to be the record of criminal cases tried by the mayor of Selma. It does not appear from the bill of exceptions whether the witness Hill, whose infamy is sought to be established, was convicted by the mayor sitting *ex officio* as a justice of the peace, of an offense against the State of Alabama, or whether he was convicted merely of the violation of a *municipal ordinance*. If only of the latter offense, the conviction has been held by this court not to render the witness infamous, and, therefore, his competency would be unaffected.—*Cheatham v. The State*, 59 Ala. 40.

29. The record shows that, by consent of parties, all matters which could be specially pleaded was authorized to be given in evidence under the general issue. This was held in *Folkes v. Collier*, decided at the December term, 1881,* to be tantamount only to a plea of not guilty, or of the general issue. The defendants could, therefore, derive no benefit from this agreement which they could not have enjoyed under the general issue.

Other rulings are raised and discussed, but we deem their consideration unnecessary.

The judgment of the City Court is reversed and the cause remanded.

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*This case has never been reported.—REP.

[Alexander v. Alexander.]

Alexander v. Alexander.*Statutory Real Action in the Nature of Ejectment.*

1. *Charges to jury; how framed and construed.*—Charges to the jury should always be framed in reference to the testimony; and in construing them this court must have regard to the same standard.

2. *Presumptions on appeal in favor of rulings of primary court.*—The rule is, that this court can not presume anything, not shown by the record, as a ground for reversing the ruling of the primary court; and when an affirmative charge is given, which would be correct on any state of facts, it will be presumed that there was testimony which authorized the charge, unless the record affirmatively shows the contrary.

3. *Delivery of deed; what evidence sufficient to establish.*—It may be regarded as settled in this State, that when a paper purporting to be a deed is shown to have been signed by the grantor, to have been acknowledged and duly certified by a proper officer, and recorded in time in the office of the judge of probate of the county in which the lands lie, and there is no other evidence to weaken the force of these facts, this is sufficient proof of complete execution by delivery, although there is no direct proof of that fact.

4. *Same; whether presumption of delivery overturned, quære.*—But where the testimony also shows that when the deed was acknowledged and certified, the grantor took possession of it, and sent it to the registration office, with directions that, when recorded, it should be returned to him, which was done,—*quære*, whether this would not overturn the *prima facie* presumption of delivery which would otherwise arise from its acknowledgment and record, and whether this, unexplained by other testimony, would not show that there was, in fact, no delivery.

5. *Same; how ascertained when testimony indeterminate or ambiguous.* The question of the delivery *vel non* of a deed, when the testimony is indeterminate or ambiguous, is, and must be a question of intention with which the ambiguous or disputable act or acts, were done or performed.

6. *Same; how declaration of grantor in reference to, should be considered.*—Declarations and admissions of a grantor touching the delivery of a deed, on a question of delivery *vel non*, should be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them.

APPEAL from Shelby Circuit Court.

Tried before Hon. WM. S. MUDD.

This was a statutory real action in the nature of ejectment, brought by Thomas H. Alexander against John Alexander, and was commenced on 2d September, 1879. The plaintiff claimed title under a deed alleged to have been executed by defendant, and the point of contention was, whether that deed had ever been delivered. The evidence introduced on the trial, so far as disclosed by the bill of exceptions, is sufficiently stated in the opinion. The exceptions reserved were to two sections or subdivisions of the general charge of the court, numbered 4

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and 5, and to four charges given at the request of the defendant. The portions of the general charge excepted to, and charges numbered 1 and 2, given at the request of the defendant, are sufficiently set out in the opinion. The other charges given at the request of the defendant are as follows: 3. "In considering the admissions and declarations of the defendant, testified to by any witness, if any such are testified to, such declarations and admissions should be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them." 4. "Although the jury may believe that the deed was handed by John Alexander to Thomas Alexander, and that he kept it in his possession for a few minutes, that is not sufficient to constitute a delivery, unless it passed from John Alexander, with the intention of actual delivery to said Thomas Alexander."

The trial resulted in a verdict and judgment for the defendant, from which the plaintiff appealed; and he here assigns the rulings of the Circuit Court on the charges above noted as error.

HEFLIN, BOWDEN & KNOX and WILSON & WILSON, for appellant, cited, *McLure v. Colclough*, 17 Ala. 89; *Elsberry v. Boykin*, 65 Ala. 336; *Rivard v. Walker*, 39 Ill. 413; *Mallet v. Page*, 8 Ind. 364; *Stevens v. Hatch*, 6 Minn. 64; *Warren v. Swett*, 31 N. H. 332; *Floyd v. Taylor*, 12 Ir. (L.) 47; *Waddell v. Hewitt*, 1 Ir. (Eq.) 475; *Dayton v. Newman*, 19 Pa. St. 194; *Fararr v. Bridges*, 5 Humph. 411; *Byers v. McClannahan*, 6 Gill. & J. 250; *Stewart v. Reddit*, 3 Md. 67; *Crawford v. Bertholf*, Sax. Ch. 458; *Thompson v. Hammond*, 1 Ed. Ch. 497; *Cook v. Brown*, 34 N. H. 460; *Johnson v. Farley*, 45 N. H. 505; *Scrugham v. Wood*, 15 Wend. 545; *McEwen v. Troost*, 1 Sneed, 186; *Corley v. Corley*, 2 Cold. 520; *Ruckman v. Ruckman*, 33 N. J. Eq. 356; *Jordan v. Pollock*, 14 Ga. 145; *Gebion v. Portee*, 2 Dev. & B. (Law) 530; *Braman v. Bingham*, 26 N. Y. 488.

H. C. TOMPKINS and BRADFORD & BISHOP, *contra*, cited *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 267; *Hawkes v. Pike*, 105 Mass. 560; *Elsey v. Metcalf*, 1 Den. 323; *Jackson v. Phipps*, 12 Johns. 418; *Jackson v. Dunlap*, 1 Johns. Cases, 114; *Kingsbury v. Burnside*, 58 Ill. 324; *Jackvon v. Perkins*, 2 Wend. 308; *Gilbert v. North Am. Ins. Co.*, 23 *Ib.* 43; 1 Jones on Mort. § 539; *Fuller v. Hollis*, 57 Ala. 435; *Tisher v. Beckwith*, 30 Wis. 57; *Wittick's Adm'r v. Keiffer*, 31 Ala. 199; 1 Brick. Dig. p. 337, § 23; 1 *Ib.* p. 775, § 29; *Ib.* p. 781, § 120.

STONE, J.—Charges of the court should always be framed
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in reference to the testimony, and in construing them we must have regard to the same standard.—1 Brick. Dig. 345, § 141; *DeArman v. The State*, at the present term.

The bill of exceptions leaves no room for doubt or dispute as to the following facts: John Alexander himself spoke to the draughtsman, and procured the deed to be drawn. The deed expresses a valuable consideration, and is, in form, a deed of bargain and sale, with covenants of warranty. It bears date January 18, 1870, and has the signature of John Alexander, but no subscribing witnesses. On the 5th day of February, 1870, John Alexander acknowledged the execution of the deed before a justice of the peace, who thereupon certified the acknowledgment in the form given in the statute, and bearing the same date. John Alexander thereupon enclosed the deed in an envelope, delivered it to a friend, a stranger to this record, and requested him to deliver it to the judge of probate, with directions to record it, and return it to him, John Alexander. The judge of probate marked it filed in his office for record, February 7th, 1870. After recording it, he returned it to John Alexander, the signer, who had possession of it at the trial. The bill of exceptions is silent as to the presence of Thomas H. Alexander when any of these acts were done, nor does it show any testimony that the deed ever was in Thomas H. Alexander's possession. It does not purport to set out all the testimony, but contains this clause: "There was considerable evidence by words and acts for several years next after the deed was signed, tending to show a delivery of the deed by John Alexander to Thomas H. Alexander, and considerable evidence during the same time tending to show that the deed never was delivered by John Alexander to Thomas H. Alexander." Charge numbered 4, given at the instance of defendant, would indicate that the plaintiff, Thomas Alexander, had made some proof that the deed, at some time, had been in his possession for a few minutes, but it is silent as to the time or circumstances under which he obtained the possession. The rule is, that we can not presume any thing, not shown by the record, as a ground for reversing the ruling of the primary court; and when an affirmative charge is given which would be correct on any state of facts, we presume there was testimony which authorized the charge, unless the record affirmatively shows the contrary.—1 Brick. Dig. 336, § 12.

It may be regarded as settled in this State, that when a paper purporting to be a deed is shown to have been signed by the grantor, to have been then acknowledged and duly certified by a proper officer, and recorded, in time, in the office of the judge of probate of the county in which the lands lie, and there is no other proof to weaken the force of these facts, this is suf-

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ficient proof of complete execution by delivery, although there is no direct proof of delivery. And the rulings of many other courts hold the same doctrine. These naked facts, it is said, make a *prima facie* case.—*Frisbie v. McCarty*, 1 Stew. & Port. 56; *Ward v. Ross*, 1 Stew. 136; *Elsberry v. Boykin*, 65 Ala. 336; *Corley v. Corley*, 2 Cold. (Tenn.) 520; *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 267; *Jackson v. Perkins*, 2 Wend. 308.

In the statement of undisputed testimony in this case, those points stated above are not left alone. The testimony equally shows that when the deed was acknowledged and certified, John Alexander, the grantor, took possession of it himself, sent it to the registration office, and directed that, when recorded, it should be returned to him, and it was done. If it were necessary for the decision of this case, it may present a question of grave inquiry, whether this fourth fact does not overturn the *prima facie* presumption of delivery, which would otherwise arise out of the first three enumerated facts. Does it not (unexplained so far as this record informs us), show there was, in fact, no delivery at that time?

Sectiions or subdivisions 4 and 5 of the general charge, and charges 1 and 2 of those given at the instance of defendant, each asserts, substantially, the same proposition, namely: That although John Alexander signed and acknowledged the deed and had it recorded, yet this would not constitute the paper an executed conveyance, unless the jury were satisfied from the evidence that the deed passed from the grantor, John Alexander, with the intention of delivery to the grantee, Thomas Alexander. In construing these charges, we must not lose sight of the testimony, that John Alexander took control of the deed, both after the acknowledgment was certified, and after the deed was recorded. The question of delivery then depended on the other testimony, *pro* and *con*, bearing on the question of delivery, but not set out. In this connection, the implication found in charge 4, given at the instance of defendant, should not be ignored. That implication is, that, at some time, Thomas Alexander had the paper in his hands for a few minutes. And in favor of the correct ruling of the court, we must suppose the circumstances were such as to raise some doubt or dispute, whether such temporary possession, and contradictory evidence as to whether the defendant actually parted with dominion over the deed, were or were not of that debatable class, the motive or intent of which becomes a question for the jury. The books abound with rulings, which declare that the question of delivery *vel non*, when the testimony is indetrminate or ambiguous, is, and must be a question of intention with which the ainbiguous or disputable act or acts were done or performed. *Hawes v. Pike*, 105 Mass. 560; *Elsey v. Metcalf*, 1 Denio, 323;

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Ruckman v. Ruckman, 33 N. J. Eq. 354; *Warren v. Swett*, 31 N. H. 332; *Dayton v. Newman*, 19 Penn. St. 194; *Byers v. McClanahan*, 6 Gill. & J. 250; *Stewart v. Redditt*, 3 Md. 67; *Johnson v. Farley*, 45 N. H. 505; *Folly v. Vantwyl*, 4 Halst. 153; *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 267; *Jackson v. Phipps*, 12 John 418; *Jackson v. Dunlap*, 1 Johns. Cas. 114; *Crawford v. Bertholf*, Saxt. Ch. 453; *Kingsbury v. Burnside*, 58 Ill. 310; *Stevens v. Hatch*, 6 Minn. 64; *Doe ex dem. v. Knight*, 5 B. & Cres. 671; *Rivard v. Walker*, 39 Ill. 413. We must suppose the word *intention*, found in several of the charges, was called forth by the indeterminate character of the testimony bearing on the question of delivery.

We do not think the Circuit Court erred in giving the charges referred to, or either of them.

The present record raises no question as to the testimony by which the intention of the grantor was sought to be shown, and we must presume the testimony was legal and free from objection. If it were shown that his intention was a mere uncommunicated purpose existing in John Alexander's mind, that might present a question of the legality of the evidence—a question not raised by this record. Intention, like notice, is probably an inferential fact, to be drawn by the jury from the facts and circumstances in evidence.—*Burns v. Campbell*, ante, p. 271 and authorities cited.

Charge 3, given at the instance of defendant, is in the exact language of the authorities, and is free from error.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

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Action against Auditor for Refusal to allow an Attorney inspect Public Records in his Office.

1. *Books and documents of public office; right of inspection.*—While the books and documents of a public office are the property of the public, and are preserved for public uses and purposes, it is not the unqualified right of every citizen to demand access to, and inspection of them; but, to entitle one to an inspection of such books and documents, other than judicial records, he must show that he has an interest therein, and desires an inspection thereof for a legitimate purpose.

2. *Same; what is; right of attorney to inspect.*—The book kept by the Auditor of the State, in obedience to the requirement of the statute, for the purpose of entering the accounts of tax collectors with the State, is a public record; and an attorney at law, employed by an ex-tax collector

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to represent him on a settlement of his accounts with the Auditor, has an interest which entitles him to an inspection of the accounts of his client as entered in such book.

3. *Same; when Auditor may demand evidence of attorney's authority.* But the Auditor may demand of the attorney satisfactory evidence of his authority to represent the tax collector, and may, if he fail or refuse to furnish it, decline to allow an inspection of the accounts by him. In such case, the presumption of authority obtaining in courts, arising from the attorney's license, and from the fact that he is an officer of court, can not be claimed.

4. *When witness can not testify to his belief.*—In an action against the Auditor by an attorney, to recover damages alleged to have been suffered by the attorney on account of the Auditor's refusal to allow him to inspect the records in the latter's office, in which were kept the accounts between the State and certain tax collectors represented by the attorney, it is not permissible for either the defendant or his clerk to testify to the *belief* either may have had as to the plaintiff's employment, or as to his authority to represent the tax collectors. If such belief were a material fact in the case, it is an inference to be drawn by the jury from the circumstances which may be in evidence.

5. *Inspection of public documents in Auditor's office; when right to not forfeited.*—The inspection of public documents can not be denied merely on the ground that the party applying for it has been guilty of some past impropriety of conduct as to matters to which such documents may refer, nor because it is apprehended that the information obtained will be employed in litigation with the State; and hence, in an action by an attorney, founded on the Auditor's refusal to allow him to inspect the accounts of tax collectors whom he represented, as entered on books in the Auditor's office, the fact that the attorney had previously availed himself of his knowledge of the contents of the books in the office, however derived, to interfere with negotiations the Auditor was conducting with others, can not deprive his clients, or him as their representative, of the right to examine into their accounts.

6. *Same; when reason for refusal to allow inspection, admissible to negative malice.*—Although such fact may not have been relevant as establishing a justification of the refusal, yet, the complaint averring that the refusal was malicious and with the intent to injure the plaintiff, it was admissible for the purpose of rebutting or negating malice, it having a fair and reasonable tendency to show that the defendant acted from a good motive and in good faith.

7. *When information on which a party acts admissible in evidence.*—In such case, information of the attorney's interference with the Auditor's negotiations for settlements with others than the attorney's clients, although derived from correspondence or verbal communication with such other parties, is competent evidence for the Auditor; as the specific fact to be shown was not the truth of the information, but the fact of its communication to the Auditor, and that he acted upon it in denying the attorney access to the books of his office.

8. *Good faith in action for exemplary damages; effect of.*—The good faith of the Auditor, in such case, in refusing the inspection may relieve him from the imputation of malice, and acquit him of liability for vindictive or exemplary damages; but it can not relieve him of liability for actual or compensatory damages.

9. *When charge properly refused.*—A charge to the jury, requested by either party, which is involved and ambiguous, and has a tendency to mislead and confuse the jury, is properly refused.

APPEAL from Lowndes Circuit Court.

Tried before Hon. JOHN MOORE.

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This action was commenced on 3d April, 1879, by Charles J. Watson against Willis Brewer, to recover damages alleged to have been suffered by the plaintiff, resulting from the refusal of the defendant, while Auditor of the State, to allow him access to, and an inspection of certain public records belonging to the Auditor's office, containing accounts between the State and one J. F. Boyles, as tax collector of Monroe county, and tax collectors of other counties, who had employed plaintiff, an attorney-at-law, to represent them in certain matters of dispute touching said accounts. The cause was before this court at a former term, and is reported.—*Brewer v. Watson*, 65 Ala. 88. In the report of the case on that appeal the complaint is fully set out. The defendant's plea is not contained in the record on this appeal. After the cause was remanded, a second trial was had, resulting in a verdict and judgment for the plaintiff.

As shown by the bill of exceptions, the evidence introduced on the trial tended to show, that the defendant, after he became Auditor of the State, revised the settlements of the accounts of tax collectors of different counties of the State, made with his predecessor in office, and had, in many cases, undertaken to correct what he supposed were erroneous allowances made to them, by charging them with such items in the account of the then current year; that some five or six of the tax collectors whose accounts had thus been revised, among whom was the said Boyles, had employed the plaintiff as their attorney to represent them in the settlement of their accounts, and to have all items thus charged against them from former settlements "expunged from their present accounts;" that on 24th September, 1878, plaintiff, under this employment, called at defendant's office, "as he had frequently done before," to look at the account of said Boyles on the tax-ledger in the defendant's office, and, the defendant not being present, asked the clerk in charge for leave to look at it, who replied that the Auditor, the defendant, had directed him to lock up that book, and to permit no one to see it, unless he had an interest therein, and that under these instructions he could not show it to plaintiff, unless he had a power of attorney from Boyles to represent him; he also requesting plaintiff to wait until defendant returned home; that plaintiff assented to this, but left with the clerk for defendant a written demand for "the privilege to examine the tax-ledger for the years 1874, 1875, and 1876, containing the accounts of J. F. Boyles, ex-tax collector of Monroe county;" that on the next day plaintiff returned and, finding the defendant in his office, asked him whether he had received the written demand which he had left for him, to which defendant replied that he had, and further stated that "he would not per-

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mit plaintiff to examine the tax-ledger unless he had a power of attorney;" that thereupon plaintiff, in the presence of another whom he had called in, renewed his demand to inspect said ledger; and was again refused, unless he had a power of attorney; and that prior to these interviews the plaintiff had received a letter from said Boyles, directed to him, dated 21st September, 1878, in these words: "Yours dated Sept'r 15th, is at hand, regarding the amount you say is due me. Please collect, reserve your commissions, and forward the remainder to me." The evidence for the plaintiff tended to show that, in the above mentioned interviews, the plaintiff told the defendant and his clerk, that he had no power of attorney, but that he had received said letter from Boyles, and that he showed it to both of them; but the evidence for the defendant tended to show that he neither showed the letter, nor said any thing about it in either interview. The evidence showed further that the plaintiff, prior to the dates of said conversations, had been in the employment of the defendant, as a clerk in the Auditor's office, but had quit such employment, and was engaged in practicing law. Evidence was also introduced by the plaintiff, tending to show that he had been damaged by the refusal of the Auditor to allow him to inspect said ledger, and the extent of such damage.

The defendant, after introducing evidence tending to show that his action, in refusing to allow plaintiff to examine the tax-ledger, was not prompted by malice or other evil motive, offered to prove, as his reason for such refusal, "that, at and prior to the said demand, important negotiations were going on for settlements of accounts with tax collectors and probate judges; that these negotiations had been suddenly interrupted; that defendant was informed by letters, which were produced and offered in evidence, from tax collectors and probate judges who were about settling their balances, that some person had written to them not to pay, and that there was no necessity to pay, and that this person was the plaintiff, and stating this as the reason why they would not pay; that this intermeddling was greatly to the hinderance of the collection of the taxes, and was the reason why defendant denied access to the ledger, except to those showing an interest therein, or an authority to represent those interested; that he demanded such authority from plaintiff, and he exhibited none to him; and that this was the reason of his refusal." To this evidence the plaintiff objected; his objection was sustained, and the defendant excepted. The substance of this offered proof was sought to be introduced in other forms, which need not be stated. "The court, however, allowed defendant to testify to the fact that important negotiations were going on, and that they were broken off, and that

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defendant was annoyed thereby; and that plaintiff did not, at the time of said demand, exhibit any authority to represent any person having an account in said tax-ledger." The defendant also reserved an exception to the refusal of the court to allow him to show that, at the time of the respective interviews between plaintiff and defendant, and his clerk, above mentioned, neither he nor his clerk believed that plaintiff had been employed by Boyles in the matters referred to, or that he had any authority to represent Boyles.

The defendant also reserved exceptions to the refusal of the court to give the following charges to the jury, requested in writing by him: 1. "That such a public officer as the Auditor, in dealing with persons representing others, is not bound to accept the statement of such parties as to the fact of such employment." 2. "That if from the evidence the jury believe that the defendant may have honestly believed that an inspection of the tax-ledger by the plaintiff was more calculated to be prejudicial to the public interests, than an inspection by other persons not so familiar with the business in the auditor's office, then the jury may look at that fact in determining whether or not the defendant was actuated by malice in refusing an inspection of the tax-ledger by the plaintiff." 3. "That if the jury believe that the defendant refused plaintiff's demand honestly and *bona fide*, in the public interest, and from a sense of his duty as a public officer, then the defendant is not liable." Another charge requested by the defendant, numbered 5, was also refused, to the refusal of which the defendant excepted; but the view taken of this charge renders it unnecessary to set it out.

The rulings of the Circuit Court above noted are here assigned as error.

COOK & ENOCHS and GUNTER & BLAKEY, for appellant.

WATTS & SONS, R. M. WILLIAMSON, and GEO. F. MOORE, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—We regard it as settled, that the book kept by the auditor, in obedience to the requirement of the statute, in which he enters the accounts of the tax collectors with the State, is a public writing or record, subject to the inspection of any citizen having a legitimate interest, which an inspection will subserve. It is also settled, that an attorney-at-law, employed by a tax collector whose office has expired, to collect a balance due from the State, or claimed to be due, has

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an interest which entitles him to an inspection of the accounts of his client.—*Brewer v. Watson*, 61 Ala. 310. It is not the unqualified right of every citizen to demand access to, and inspection of the books or documents of a public office, though they are the property of the public, and preserved for public uses and purposes. The right is subject to the same limitations and restrictions, as is the right to an inspection of the books of a corporation, which strangers can not claim, and which is allowed only to the corporators, when a necessity for it is shown, and the purpose does not appear to be improper.—1 Greenl. Ev. § 474; Ang. & Ames on Cor. §§ 681–2. And the individual who claims access to public records and documents (not judicial records, of which, by statute and unvarying usage, the custodian, upon the payment of the fee allowed by law, is bound to furnish copies), can properly be required to show that he has an interest in the document which is sought, and that the inspection is for a legitimate purpose.—1 Whart. on Ev. § 745; 1 Greenl. on Ev. 475; 1 Tidd's Prac. 593; Gres. Eq. Ev. 115.

In the present case, the inspection was demanded by the appellee as an attorney for several tax collectors. An individual interest in the accounts he sought to examine, was not claimed; the right was asserted wholly in a representative capacity. The usual office and duty of an attorney-at-law is the representation of parties in courts of justice. It is for this purpose that he is licensed under the authority of the State. When he appears in a court of the State granting the license, the appearance is presumed to be authorized. Against an unauthorized appearance the court can afford protection to its suitors, and the attorney making it could be summarily punished for contempt. The court, of its own motion, or the opposite party may require that the attorney produce evidence of his authority.—Whart. on Agency, § 563; Code of 1876, § 798. When the attorney is not appearing for a party in a court of justice; when his representation is for the transaction of business elsewhere, and business which would lie in the scope of an ordinary agency which any person is capable of transacting, the presumption of authority obtaining in court, arising from his license, and because he is an officer of the court, can not be claimed. Strangers can not safely deal with him on the faith of such representation, and have the right to demand from him some reasonable and satisfactory evidence of his authority—other evidence than his mere assertion. If the Auditor had accepted and acted upon the bare representation of the appellee, that he was the attorney of the several tax collectors whose accounts he proposed to examine, the representation would have been disputable by the collector, and each of them, if it was untrue, could the next hour or the next day have demanded the same in-

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spection from the Auditor. Any agent or attorney, proposing to transact business of any kind for his principal with others, can be required to furnish some satisfactory evidence of his authority. It is neither just nor reasonable to demand that those with whom he proposes to deal should accept and act upon his mere assertion of authority; and if he refuses to furnish such evidence, the transaction of business with him may be properly refused. We are, therefore, of opinion that the Circuit Court erred in its refusal of the first instruction to the jury requested by the appellant.

It was not, however, permissible for the appellant, or witness Whitman, his clerk, to state the belief either may have had as to the employment of the appellee, or as to his authority to represent Boyles, or other tax collectors. The question has been often considered in this court, and such evidence has been uniformly pronounced inadmissible. Whether the appellant believed the appellee had the authority asserted, if a material fact, is an inference to be drawn by the jury from the circumstances which may be in evidence.— *Whetstone v. Bank at Montgomery*, 9 Ala. 874.

The individual demanding access to, and inspection of public writings must not only have an interest in the matters to which they relate, a direct, tangible interest, but the inspection must be sought for some specific and legitimate purpose. The gratification of mere curiosity, or motives merely speculative will not entitle him to demand an examination of such writings. 1 Whart. on Ev. § 745; *King v. Merchant Tailors' Co.*, 2 Barn. & Ad. 115; *King v. Justices Staffordshire*, 6 Ad. & Ell. 84; *Ex parte Briggs*, 1 Ell. & Ell. 881 (102 Com. Law, 879); *People v. Walker*, 9 Mich. 328.

The office of Auditor is by the constitution declared a part or a branch of the executive department of the State. The duties he is required to perform relate almost exclusively to the fiscal affairs of the State, of which he has a general superintendence. Among other duties he is required to perform, is the audit and adjustment of the accounts of all public officers, and the keeping of a regular account with every person in the State charged with authority to receive any part of the public revenue. The book in which these accounts are entered is obviously of the highest public value and importance, and is of value and importance to each individual whose account is therein entered. It would be idle to expose it to the impertinent intrusion of any and every person who might claim access to it; and it would be inexcusably wrong to withhold it from the examination of such persons as proved that they had some specific, direct, tangible interest, an inspection would subserve. For the public, and for persons showing such in-

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terest, the Auditor should, as should every custodian of public writings, regard himself as a trustee—preserving them for the public against all impertinent intrusion, allowing ready access to those who have interest, and claim access for the purpose of promoting or protecting it. Even to such persons access may be withheld, if the disclosure sought would prove detrimental to the public interests. As a witness, in such a contingency, the custodian of writings would be privileged from testifying to facts shown by them, or information obtained from them.

The evidence offered in various forms for the purpose of showing that access to the accounts of his clients was withheld from the appellant, because negotiations were pending between the Auditor and tax collectors and judges of probate, for a settlement of balances claimed to be due from them to the State, and that such negotiations had been broken off by the interference of the appellee, was excluded. It was not shown, or offered to be shown, that these negotiations were being conducted with either of the clients of the appellee, whose accounts it was proposed to inspect. It was the right of the client to inspect his accounts with the State as kept by the Auditor, and which, if kept in the regular course of official duty, were *prima facie* evidence for and against the client, the appellee asserted, and not his individual right. If the appellee had demanded a general inspection of the books or writings in the office, or of a particular book, in all the entries of which a direct interest was not shown, the generality of the demand would have justified its refusal. But that he had availed himself of his knowledge of the contents of the books, however derived, to interfere with negotiations the Auditor was conducting with others, could not deprive his principals of the right, or deprive him of the right, as their representative, to examine into their accounts. The inspection of public writings may not be denied, because the party applying for it has been guilty of some past impropriety of conduct as to matters to which such writings may refer, or because it is apprehended that the information obtained will be employed in litigation with the State.—*People v. Throop*, 12 Wend. 183. If the evidence tended to show that the purpose of the appellee was not really an ascertainment of the state of the accounts of his principals, but was the annoyance of the appellant, or of his clerks, or that the purpose was fishing and speculative, the hope of finding material for contingent litigation, a different question would arise, and the refusal of the Auditor to allow the inspection would probably be justified.

But, although the evidence may not have been relevant as establishing a justification, it had a direct bearing upon the inquiry into the motive and good faith of the refusal. These

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were directly involved, for the averment of the complaint is, that the refusal was *malicious* and with the *intent to injure* the appellee. When malice is imputed and is an element of recovery, whatever circumstances have a fair and reasonable tendency to show that the party to whom it is imputed acted from a good motive and in good faith, ought to be received.—*Barron v. Mason*, 31 Vt. 189; 2 Greenl. on Ev. § 454; *Burns v. Campbell*, *ante* p. 271. The information of the interference of the appellee with the negotiations for settlements with tax collectors and judges of probate, may have been derived from correspondence or verbal communication with them. The specific fact to be shown was not the truth of the information, but the fact of its communication to the appellant, and that upon it he acted in denying the appellee access to the books of his office. Hearsay evidence, the unsworn statements of others, whether verbal or written, is not competent evidence of a specific fact. That species of evidence is easily distinguished from evidence of information on which a party acts, when the inquiry is not into the truth of the information, but into the fact of its communication and his good faith in acting upon it. 1 Greenl. on Ev. §§ 100–101. To repel the imputation of malice, the evidence was admissible. The second instruction requested, in this view, ought to have been given.

The third instruction requested was properly refused. The good faith of the appellant in refusing the inspection may relieve him from the imputation of malice, and acquit him of liability for vindictive or exemplary damages, but it can not relieve him of liability for actual or compensatory damages, if it be shown the refusal was wrongful.—*Brewer v. Watson*, 65 Ala. 88.

The fifth instruction is involved and ambiguous. It had a tendency to mislead and confuse the jury, and for this reason was properly refused.

For the errors pointed out, let the judgment be reversed and the cause remanded.

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Indictment for an Assault with Intent to Murder.

1. A crime can not be split up into two or more distinct offenses.—A single crime can not be split up, or subdivided into two or more indictable offenses; and hence, if the State, through its authorized officers, elects

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to prosecute a crime in one of its phases or aspects, it can not afterwards prosecute for the same criminal act under color of another name.

2. *Plea of former conviction; when good.*—To an indictment for an assault with an intent to murder, a plea of former conviction of an assault and battery with a stick in the county court, based on the same criminal act, is good, although the offense charged in the indictment is a felony, and the offense for which there was a former conviction is merely a misdemeanor.

3. *Same; when vitiated for fraud.*—If, however, the former conviction was procured by the fraud, connivance or collusion of the defendant, this would vitiate the conviction, and it would not be a bar to the indictment.

4. *Same; plea need not negative fraud.*—The defendant is not required to negative in his plea the existence of such fraud, connivance or collusion; but, if it exists, the State must set it up by replication to the plea.

5. *Sections 4629-30 of the Code; when provisions not applicable.*—The provisions of sections 4629-30 of the the Code of 1876 have no application in this case, as they only authorize the abatement of a prosecution for a misdemeanor, pending in the circuit court, on sworn plea of the defendant, averring that the county court had acquired prior jurisdiction, without his "agency, request, participation, or authority," and that the prosecution is still pending in the county court, and on proper proof supporting the plea.

APPEAL from Greene Circuit Court.

Tried before Hon. WM. S. MUDD.

The facts are sufficiently stated in the opinion.

HEAD & BUTLER, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The defendant was indicted in the Circuit Court of Greene county for an assault and battery, with a stick, upon one Dunlap, with *intent to murder* him—an offense which is denounced as a *felony* by the statute, being made punishable by imprisonment in the penitentiary, or hard labor for the county, for not less than two, nor more than twenty years.—Code, § 4314. The defense interposed is that of a former conviction of *an assault and battery*, with a stick, prosecuted in the *county court*—an offense punishable as a misdemeanor, by fine, and imprisonment in the county jail, or sentence to hard labor for the county, for not more than six months. Code, § 4318. The county courts have no jurisdiction of felonies, but have original jurisdiction, concurrent with the circuit and city courts, of all misdemeanors, committed in their respective counties.—Code, § 718. The question raised for our decision is the correctness of the ruling of the Circuit Court in sustaining a demurrer to this plea of *autrefois convict*, based on this state of facts.

We are clearly of the opinion that the plea was good, and

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the court erred in sustaining the demurrer. It may be true that an acquittal of a minor offense will not, in all cases, operate to bar a greater.—1 Bish. Cr. Law (6th Ed.), § 1059. Hence, we sometimes find the general declaration anciently made, that “an acquittal upon an indictment for a felony is no bar to an indictment for a misdemeanor, and *e converso*.”—Arch. Cr. Pl. 52; 2 Hawk. B. 2, C. 35, § 5. But this must be understood to be true only of “those cases in which the former charge did not necessarily include the latter.”—Chitty Cr. L. 456. The true rule seems to be, that, *if the minor offense is embraced within the major one*, as a constituent element, or component part of it, and on the trial of the one *there can be a conviction of the other*, then a former conviction or acquittal of the minor will bar the major.—Whart. Cr. Ev. § 584; 1 Bish. Cr. Law, §§ 1055–1058. This is certainly the general rule, subject, perhaps, to certain exceptions, either real or apparent.—1 Whart. Amer. Cr. Law, § 563, 566. If such were not the case, as suggested by Mr. Bishop, “then the prosecutor may begin with the smallest, and obtain successive convictions, ending with the largest [offense]; while, if he had begun with the largest, he must there stop—a conclusion repugnant to good sense.”—1 Bish. Cr. Law (6th Ed.), §§ 1057, 1055.

A conclusive reason for the soundness of this view, to our mind, is, that if a defendant has been tried for the *smaller* offense—whether acquitted or convicted it is immaterial—and he is afterwards put on trial for the *larger*, he is twice in jeopardy for the smaller offense. The Declaration of Rights provides, that “no person shall, for the same offense, be twice put in jeopardy of life or limb.”—Const. 1875, Art. 1, § 10. The principle of *autrefois convict* or *acquit* is known to have been based upon the parallel principle of the common law, forbidding, at least in the established practice of the courts, that any one should be twice put in jeopardy for the same offense.—Well’s Res. Adj. § 408; 1 Bish. Cr. L. §§ 981–982. It was a universally admitted rule at common law, that a conviction of *manslaughter* would bar an indictment for murder, based upon the same act of homicide; for, observes Blackstone, “the fact prosecuted is the same in both, though the offenses differ in coloring.” 4 Black. Com. 336; 4 Coke, 45–46; 2 Hale, 246. And the same principle has become the settled rule of the American courts, under statutes defining the crimes of murder and manslaughter.—1 Bish Cr. L. (6th Ed.) § 1056, 1068; *Brennan v. People*, 15 Ill. 511; *Hurt v. State*, 25 Miss. 378; *People v. Hunckeler*, 48 Cal. 331. The reason is, that manslaughter is a component part of the crime of murder, and if not guilty of the lesser offense, a defendant can not be guilty of the greater, which is the same crime with the additional element of malice

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and design. So, when convicted of the lesser offense, if afterwards tried for the greater, he will be placed in jeopardy a second time for the lesser, for which he might be convicted under an indictment for the greater.—*State v. Cooper*, 1 Green (N. J.), 361, 372. In *State v. Chaffin*, 2 Swan (Tenn.), 493, this rule was applied to an indictment for an assault and battery, and it was held, that one convicted of an *assault* only is protected thereby from prosecution afterwards for the *battery*. It was observed by the court, that “the one is a necessary part of the other; and if he [the defendant] be now punished for the battery, he will thereby be twice punished for the assault.”—1 Bish. Cr. L. § 1058. So it has been held by other courts, quite uniformly, that where a defendant is convicted of an assault, on an indictment for an assault and battery; or of an assault under an indictment for an assault with intent to murder, he can not afterwards be tried for the greater offenses—the assault and battery, or the assault with intent to murder.—Whart. Cr. Ev. § 584. The case of *Commonwealth v. Miller*, 5 Dana (Ky.), 320, presents a ruling analogous to the above authorities. It was there held, that a conviction of a breach of the peace, before a justice’s court, would bar an indictment in the circuit court for an assault and battery in the commission of such breach of the peace. The decision was placed on the ground, that a second prosecution would be violative of the principle, that no person should be twice punished for the same offense. In *State v. Johnson*, 12 Ala. 840, it was decided that two indictments, one for *resisting legal process*, and the other for *an assault*, can not be supported where they are intended to cover essentially the same offense, the decisive test being considered to be, that the same testimony would support both charges.

These decisions are, in our opinion, based upon sound legal principles. A single crime can not be split up, or subdivided into two or more indictable offenses.—*Drake v. State*, 60 Ala. 42. A series of criminal charges can not, under our system of jurisprudence, be based on the same offense, or criminal act, at least, as concerns the dignity of the same sovereignty.—*Reg. v. Elrington*, 9 Cox C. C. 86; *State v. Damon*, 2 Tyler (Vt.), 387; 2 Bish. Cr. Law, § 1060. If the State elects, through its authorized officers, to prosecute a crime in one of its phases, or aspects, it can not afterwards prosecute the same criminal act under color of another name. It was forcibly said in *Jackson v. The State*, 14 Ind. 327–8: “The State can not split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.” Such was the view also taken in *State v. Cooper*, 1 Green (N. J.), 361, where it was held that the prisoner’s acquittal of the crime of *arson*,

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which resulted in the unintentional destruction of the life of a human being, was a good defense, under the plea of *autrefois acquit*, to an indictment charging him with the murder of the same person whose life was destroyed by the perpetration of the arson. It was said by the court that the two crimes charged were essentially the same, the one being a necessary ingredient of the other, and to permit both prosecutions would be virtually to permit the prisoner to be twice put in jeopardy for the same offense; and that "where the State has thought proper to prosecute the offense in its mildest form, it is better that the residue of the offense go unpunished, than by sustaining a second indictment to sanction a practice which might be rendered an instrument of oppression to the citizen." See also *Roberts v. The State*, 14 Ga. 8; *State v. Lewis*, 2 Hawks (N. C.), 98; *Foster v. State*, 39 Ala. 229; *Harrison v. State*, 36 Ala. 248.

The above principle is subject, of course, to the modification that if the former conviction was procured by the fraud, connivance, or collusion of the defendant, this fact vitiates it, and it is no bar to a subsequent prosecution.—*State v. Little*, 1 New Hamp. 257; *State v. Lowry*, 1 Swan (Tenn.), 34; *State v. Reed*, 26 Conn. 202; 1 Bish. Cr. L. §§ 1008, 1010.

The plea of the defendant, however, is not required to negative such fraud on defendant's part. If the State intends to avoid the force of the plea of former conviction, or acquittal, by showing that the proceedings in the former case were fraudulently designed to shelter the defendant from the punishment justly due his offense, such facts must be set up by *replication* to the plea.—*State v. Clenny*, 1 Head (Tenn.), 271.

Section 4629 and 4630 of the present Code have no application to this case. They only authorize the abatement of a prosecution for a misdemeanor, pending in the circuit court, on sworn plea of defendant, supported by proper proof, and averring the fact that the county court had acquired prior jurisdiction of the same offense, without his "agency, request, participation, or authority," and alleging further that the *prosecution was still pending in the county court*. Although the jurisdiction of the two courts is concurrent as to all misdemeanors, and the usual rule in such cases is that the court first acquiring jurisdiction retains it, the evident purpose of these statutory provisions was to give the circuit court priority of jurisdiction, unless the prosecution in that court should be abated by such a sworn plea as that required.

The judgment of the Circuit Court must, under these views, be reversed, and the cause remanded. In the meanwhile, let the defendant be retained in custody until properly discharged by due process of law.

Coleman v. The State.

Indictment for Embezzlement.

1. *Judgment-entry when new indictment ordered to be preferred for variance or other defect; what should contain.*—When, under the Code, a new indictment is ordered to be preferred against a defendant—either for a variance, under a section 4817, or on account of an insufficient description, or other defect, under section 4819, the judgment-entry should show, in order to prevent the running of the statute of limitations, under the provisions of section 4820, that a *nolle prosequi* was entered, or that the indictment was quashed, or otherwise disposed of; and if a *nolle prosequi* is entered for a variance, the entry should further show that the order was made before the jury retired.

2. *Same; when insufficient.*—Hence, a judgment-entry reciting that there was “a misdescription in the indictment of matter therein stated,” and that the defendant had refused to allow it to be amended, “so as to conform to the correct description,” and holding the defendant to bail in a stated sum “to await any new indictment that may be found against him for the same offense,” without more, is insufficient to prevent the running of the statute of limitations, whether the order was made under section 4817, or under section 4819 of the Code.

3. *Same; when defendant entitled to an acquittal.*—If, in such case, the bar of the statute of limitations is complete, the defendant is entitled to an acquittal, unless the judgment-entry is amended *nunc pro tunc*, curing the defect.

APPEAL from the City Court of Montgomery.
Tried before Hon. THOMAS M. ARRINGTON.

The facts are sufficiently stated in the opinion.

JNO. GINDRAT WINTER for appellant.—The judgment-entry is not a substantial compliance with the form laid down, nor with the terms of the statute. It fails to set out the variance. It fails to show that the prosecution was dismissed, and that another indictment was ordered to be preferred.—Code of 1876, §§ 4816–17. The second indictment was not, therefore, connected with the first so as to come within the terms of section 4820 of the Code, and hence, the offense charged was barred by the statute of limitations.

H. C. TOMPKINS, Attorney-General, for the State, cited *Foster v. The State*, 38 Ala. 425; *Weston v. The State*, 63 Ala. 155.

STONE, J.—The offense, a misdemeanor, for which the defendant was tried, was committed in December, 1880. The
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indictment, under which he was tried and convicted, was found at the July term, 1882, more than twelve months after the offense was committed. The offense was consequently barred by limitation, unless the record shows a state of facts which takes it out of the operation of the statute. It is contended, and was so ruled in the court below, that the record facts in this case do bring it within the saving influence of sections 4816 to 4820, inclusive, of the Code of 1876; and this presents the only question for our consideration. All those sections relate to errors and imperfections in indictments, how they may be amended and cured, and the effect of the amendment when made.

The statutes we have referred to are very liberal in their provisions. Section 4816 allows an amendment with the consent of the defendant, "when the name of the defendant is incorrectly stated, or when any person, property, or matter therein stated is incorrectly described." Section 4817 declares the rule to be observed, when one of the defects pointed out in section 4816 occurs, and the defendant will not consent to an amendment. "The prosecution may be dismissed at any time before the jury retires, . . . and the court may order another indictment to be preferred, . . . in which case an entry of record must be made," etc. The form given requires the variance to be set out in the judgment entry. Section 4818 does not bear on this case, except that it requires the judgment entry to state that "the indictment is lost, mislaid or destroyed." Section 4819 provides that "when the judgment is arrested, or the indictment quashed on account of any defect therein, or because it was not found by a grand jury regularly organized, or because it charged no offense, or for any other cause, the court may order another indictment to be preferred for the offense charged, or intended to be charged; and in such case an entry of record must be made, setting forth the facts." Section 4820 directs that when a new indictment shall be preferred under either of the sections 4817-8-9, described above, the time elapsing between the finding of the first and second indictments shall not be computed in estimating the limitation.

In the trial of this cause the proof showed the following state of facts: At the February term, 1881, the grand jury found and returned into court a true bill, charging that the defendant, as agent of Laura Frazier, had embezzled fifteen 75-100 dollars, which he had received from her, to be used by him as such agent "in paying a fine and costs which had been assessed against a brother of said Laura Frazier, and which said Coleman had promised to do." At the February term, 1882, the following judgment entry was spread on the minutes of the court:

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"There being a misdescription in the indictment of matter therein stated, and the defendant refusing to allow the indictment to be amended, so as to conform to the correct description, the defendant is held in the sum of one hundred and fifty dollars to await any new indictment that may be found against him for the same offense." No other or fuller entry is shown to have been made of record, nor are we informed, except to the extent shown in the said judgment entry, what disposition was made of the indictment first found. The second indictment, under which the trial and conviction were had, differed from the first only in the averment that the money was placed in the hands of the defendant Coleman "to be used by him in paying a fine and costs which had been assessed against one Robert Wright, and which the said Coleman had promised to do;" thus describing the person by name in whose exoneration the money was agreed to be paid.

The indications of the minute entry copied above, as far as it gives indication, are, that in remedying the defect in the first indictment, attempt was made to conform to the provisions of section 4817 of the Code. If so, it failed to "set out the variance," which rendered a new indictment necessary, as prescribed by that section, and the form given. In a proceeding under a statute, such as this, it would be well to conform to all that is substantial in the statutory requirement. Such statutes are scarcely entitled to a liberal construction.—*State v. Kreps*, 8 Ala. 951. But we need not inquire whether the failure to *set out the variance*, or what it consisted in, if there were no other defect, would be enough to reverse the judgment. There are other defects.

It would seem that in this case the question was not one of variance. There is nothing in the record to show that the "brother of the said Laura Frazier," mentioned in the first indictment, is not the "Robert Wright" described in the second. If so, it was not a question of variance, but of insufficient description. For such imperfection the judgment might be arrested, or the indictment quashed, and a new indictment preferred, under section 4819 of the Code. But, in this case, as in the other, an entry of record must be made, setting forth the facts. The difference consists in the different facts to be set forth. In the latter case, it would be sufficient if the minute entry showed the judgment was arrested, or the indictment quashed for a defect in the latter, or in its finding, as the case might be.

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The minute entry in this case, relied on as preventing the running of the statute of limitation, is wholly insufficient. It fails to show the first indictment was quashed, nol-prossed, or otherwise disposed of. This is necessary under either of the sections of the Code referred to above. And if a *nol. pros.* was submitted to for a variance, under § 4817 of the Code, the minute entry should show it was done before the jury retired.

We have been referred to *Foster v. The State*, 38 Ala. 425, and *Weston v. The State*, 63 Ala. 155. The first of these cases raised no question on the sections of the Code we have been considering. The offense in that case was not barred, when the second indictment was found. The case of *Weston* arose under § 4819 of the Code, and no question was considered, bearing on the sufficiency of the minute entry. It showed affirmatively that the indictment had been quashed, for irregularity in the organization of the grand jury by which it had been presented. They shed no light on this case.

The minute entry, under which the second indictment was found, is so defective, that, in its present form, the defendant can not be convicted. We can not know there is nothing in the court below, by which it can be amended *nunc pro tunc*. Without such amendment the defendant is entitled to an acquittal.

Several rulings of the court are not reconcilable with these views. Reversed and remanded. Let the defendant remain in custody until discharged by due course of law.

Gordon v. The State.

Indictment for Burglary.

1. *Plea of former conviction or acquittal; sufficiency of.*—The test of the sufficiency of a plea of former conviction or former acquittal is, whether the facts averred in the second indictment, if found to be true, would have warranted a conviction upon the first. The two offenses must be the same, identical in law and in fact, or an acquittal or conviction of the one is not a bar to a prosecution for the other.

2. *Same.*—However closely connected in point of fact the offenses may be, if, in contemplation of law, they are distinct and different offenses, there is no protection against a prosecution for both, except in cases in which the State elects to prosecute for them as but one offense.

3. *Burglary and larceny; when conviction may be had for either under indictment for burglary.*—In burglary, if the intent to steal has been consummated, if there is not only the criminal breaking and entry, but an actual felonious taking of the goods of another, the burglary and larceny are so closely connected and so combined, that they may be charged in

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the same count in the indictment; and in that form the indictment is regarded as charging but one offense, a combined offense, or rather burglary committed in a particular manner, and upon it there may be a conviction of either burglary or larceny; or there may be a general conviction, though but one punishment can be imposed.

4. *Same; plea of former conviction or acquittal.*—It seems, in such case, that on a former conviction or acquittal of the larceny, the defendant having been placed in jeopardy of conviction for a part of the offense charged against him, burglary, the constitutional guaranty would protect him from the peril and vexation of another trial; but this point is not decided.

5. *Same; when former conviction or acquittal of the larceny no bar to an indictment for burglary.*—But when, as in this case, the indictment for burglary charges that the breaking and entry were done *with an intent to steal*, a former conviction or acquittal of the larceny which, it is averred, he intended to commit, when he committed the burglary, will not constitute a bar to the indictment for the burglary; for upon the former trial he could not have been convicted of the offense now charged, nor would the evidence which would support a conviction on the present indictment have availed for a conviction on the first.

APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

The opinion sufficiently states the facts.

T. H. SMITH, for appellant, cited *Adams v. The State*, 55 Ala. 143; *Moore v. The State*, ante p. 307.

H. C. TOMPKINS, Attorney-General, for the State. (No brief came to the hands of the reporter.)

BRICKELL, C. J.—The indictment, in the form prescribed by the Code, charges the defendant with having broken into and entered a building, structure, or inclosure, designated in the statute (Code of 1876, § 4343), with intent to steal, an offense which, whether committed in the night or day, is converted into, and punished as burglary. The plea interposed, we shall accept and consider, as it was accepted and considered in the City Court, as averring that upon an indictment charging simply larceny the defendant has been convicted of the larceny it is now averred he intended to commit, when he committed the criminal breaking and entry. The question is thus directly presented, whether the conviction of the larceny is a bar to a prosecution for the burglary.

An indictment for burglary must of necessity be framed as is the present indictment, when the criminalizing element is an intent to steal, if there is not an actual larceny; averring no more than the evil intent. But if the intent has been consummated; if there is not only the criminal breaking and entry, but an actual felonious taking of the goods of another, the burglary and larceny are so closely connected and so combined,

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that in the same count of the indictment the two may be charged. In that form, the indictment is not subject to objection for duplicity; it does not offend the important rule of the common law, that in a single count two offenses can not be charged or joined. It is regarded as charging but one offense, a combined offense, or rather burglary committed in a particular manner, and upon it there may be a conviction of either burglary or larceny; or there may be a general conviction, though but one punishment can be imposed.—*Fisher v. State*, 46 Ala. 717; *Wolf v. State*, 49 Ala. 359; *Commonwealth v. Tuck*, 20 Pick. 356; *Commonwealth v. Hope*, 22 Pick. 1; *State v. Squires*, 11 N. H. 37; *Jones v. State*, 16. 269; *State v. Brady*, 14 Vt. 353; *Breese v. State*, 12 Ohio St. 146; 1 Bish. Cr. Law, § 1062. If the present indictment had been in this form, if it had proceeded further, and averred the actual commission of larceny, a different question would have arisen from that which is now presented. Upon a valid indictment, before a court of competent jurisdiction, the defendant would have been in jeopardy of a conviction for a part of the offense charged against him, and, it may be, the constitutional guaranty would protect him from the peril and vexation of another trial. But upon the former trial he could not have been convicted of the offense now charged; nor would the evidence which will support a conviction on the present indictment have then availed for a conviction. The test to which a plea of former conviction or former acquittal must be subjected, is, whether the facts averred in the second indictment, if found to be true, would have warranted a conviction upon the first.—*State v. Standifer*, 5 Port. 523; *Foster v. State*, 39 Ala. 229; *Dominick v. State*, 40 Ala. 680. The two offenses must be the same—must be identical *in law and in fact*—or an acquittal or conviction of the one, is not a bar to a prosecution for the other.—4 Lead. Cr. Cases, 555; *Commonwealth v. Roby*, 12 Pick. 496. However closely connected in point of fact the offenses may be, if, in contemplation of law, they are distinct and different offenses, there is no protection against a prosecution for both, except in cases where the State may elect to prosecute for them as but one offense. The guaranty of the constitution does not extend to several prosecutions for several offenses, but to repeated prosecutions for the *same offense*. The doctrine is very clearly expressed by SHAW, C. J., in *Commonwealth v. Roby*, *supra*: “The pleas of a former acquittal and former conviction must be upon a prosecution for the same identical act and crime. It must appear to depend upon facts so combined and charged as to constitute the same legal offense or crime. It is obvious, therefore, that there may be great similarity in the facts, where there is a substantial legal difference in the nature of the crimes;

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and, on the contrary, there may be considerable diversity of circumstances, where the legal character of the offense is the same, as where most of the facts are identical, but by adding, withdrawing, or charging some one fact the nature of the crime is changed; as where one burglary is charged as a burglarious breaking and stealing certain goods, and another as a burglarious breaking with intent to steal. These are distinct offenses." The result of the authorities upon the immediate question is expressed by Mr. Bishop with his accustomed clearness and accuracy (though he doubts if they do not press more heavily against defendants, than is consistent with the humane policy of our criminal jurisprudence), in these words: "If a man in the night breaks and enters a dwelling-house, intending to steal therein, and there does steal, he may be punished for two offenses or one, at the election of the prosecuting power. If in a single count the indictment charges him with breaking, entering, and stealing, his offense is single, being burglary committed in a particular manner; but if a first count sets out the burglary as perpetrated by breaking and entering with intent to steal, then a second count may allege the larceny as a separate thing, and he may be convicted and sentenced for both. Therefore, an acquittal on an indictment charging the burglary as committed by breaking and entering with intent to steal is no bar to a prosecution for the actual theft. And a conviction of the latter will not bar an indictment for the former."—1 Bish. Cr. Law, § 1062; See also *State v. Warner*, 14 Ind. 572; *Wilson v. State*, 24 Conn. 57.

The proposition pressed most strongly by the counsel for the appellant is, that the burglary and larceny were but one act or transaction, and that it is not competent to divide or split it up into two or more indictable offenses. The State can not split up a crime and prosecute for it in parts; and a prosecution for a part will bar a further prosecution for the whole, or any of its parts.—*State v. Johnson*, 12 Ala. 840; *Foster v. State*, 39 Ala. 229; *Moore v. State*, ante, p. 307. But it can not be asserted properly and justly that the burglary and the larceny constituted a single act, or but a single crime. The burglary was a completed act, having every element and ingredient of a distinct, substantive offense, before the larceny was committed; while it rested only in intention. Until it was completed, the larceny was not committed; and while the two criminal acts may be regarded and indicted as a combined crime, neither enters into the nature or substance of the other.—*Wilson v. State*, 24 Conn. 57.

We find no error in the record, and the judgment must be affirmed.

[Blackburn v. The State.]

Blackburn v. The State.

Indictment for Grand Larceny.

1. *Statement by defendant in criminal case ; its nature.*—The statement of facts which a defendant in a criminal case is authorized to make in his own behalf, under the act approved December 2d, 1882 (Pamph. Acts, 1882-83, p. 4), being in the nature of evidence, and submitted to the jury in that character, it is subject to the ordinary intrinsic tests of credibility governing the sworn testimony of witnesses ; and hence, the jury, in determining its weight, may consider the character of the defendant, if legitimately in evidence, his demeanor on the stand, his intelligence, the accuracy of his memory, the inherent probability of his statement, its consistency with itself and the other circumstances of the case, or the lack of these elements of veracity, together with other considerations liable to affect the credibility of the statement, or afford any reasonable presumption of its probability or improbability.

2. *Same ; what weight entitled to.*—While the jury can not arbitrarily or capriciously discard the statement, any more than they can technical evidence, it is entitled only to such weight, in influencing their verdict, as they may, in good conscience and justice, see fit to give it ; and it is clearly not necessary that the statement should be corroborated by other independent testimony, in order to authorize the jury to believe it.

3. *Same ; when charge upon weight of, erroneous.*—A charge requested by a defendant in a criminal case, embodying an instruction to the jury, that his statement “is to be given no less credence on account of its not being made under oath,” being an improper infringement upon the province of the jury, was, for that reason, properly refused.

APPEAL from the City Court of Selma.

Tried before HON. JON. HARALSON.

At the January term, 1883, of said court, Lewis Blackburn, the defendant, was indicted for the larceny of a hog, and at a subsequent term he was tried and convicted. The bill of exceptions shows that no direct evidence of the defendant's guilt was introduced on the trial, but that a conviction was had on certain circumstantial evidence ; that the defendant made a statement to the jury under the act of December 2d, 1882, which tended “to contradict and disprove” the evidence for the State. The court charged the jury, *ex mero motu*, “that they might believe such statement or not, at their pleasure, giving it such weight as they might believe it entitled to.” The defendant asked the court in writing to charge the jury “that the statement of the facts in the case, made by the defendant, is to be given no less credence on account of its not being made under oath.” This charge the court refused. The defendant reserved

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exceptions to these rulings of the lower court, and here assigns them as error.

B. F. SAFFOLD, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

SOMERVILLE, J.—The indictment is for the stealing of a hog, which is made a felony by the statute, the evidence as to the identification of the property being circumstantial in its character.

The questions raised involve the proper construction of the recent act of the General Assembly, approved December 2, 1882, of which the defendant availed himself on the trial, providing that in all criminal trials “it shall be competent for defendants to make a statement as to the facts in their own behalf, but not under oath.” This is the substance of the whole enactment, with the further provision, “that should any defendant fail to make a statement as provided for in the previous (or first) section, it shall not militate or be made the subject of comment against him.”—Acts 1882–83, pp. 4–5.

At common law, as is well known, the defendant was often accorded the right to make a statement in the nature of an address to the jury in his own behalf, at least in capital cases. This right has also been more recently allowed in cases not capital, the authorities in England not being uniform as to whether it may be exercised only in cases where the defendant has no aid of counsel.—Whart. Cr. Ev. § 427. We have a constitutional guaranty, common, no doubt, to all the American States, that “in all criminal prosecutions the accused has a right to be heard by himself and counsel, or either.”—Const. 1875, Art. I, Sec. 7. In *The State v. McCall*, 4 Ala. 643, a similar provision in the constitution of 1819 was construed by this court not to authorize the accused to make a statement of facts to the jury, unless it was “authorized by the evidence adduced.” The intention of the decision was very clearly to confine this statement to a mere explanation of the facts already in evidence, not extending beyond inferences or comments in the nature of an argument of counsel. The statement was not accorded the force of independent evidence, in the proper acceptance of this term. The practice in this State has always been in uniform harmony with this rule.

In the enactment of the new statute under consideration, we can entertain no doubt of the fact that a new privilege was intended to be conferred on defendants in criminal cases, differing very materially from that previously existing. The statement of facts authorized to be made is certainly in the nature of evi-

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dence, and is submitted to the jury in that character. "The word evidence," as said by Mr. Greenleaf, "in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."—1 Greenl. Ev. § 1; 1 Stark. Ev. 10; 1 Phil. Ev. 1. Such statement is subject, in our opinion, at least to the ordinary intrinsic tests of credibility governing the sworn testimony of witnesses. The character of the defendant, if legitimately in evidence, may be considered, his demeanor on the stand, his intelligence, the accuracy of his memory, the inherent probability of his statement, its consistency with itself and the other circumstances of the case, or the lack of these elements of veracity, together with many other considerations liable to affect the credibility of the statement, or afford any reasonable presumption of its probability or improbability. Stark. Ev. (Sha'swood) 820. In Beasley's case, decided at the present term, *post*, p. 328, it is held that the defendant's statement is a legitimate subject of comment by the counsel for the accused in the argument of the case at the bar. And in Chappell's case, at present term, *post*, p. 322, it is decided that the defendant, in making his statement as authorized by statute, does not become a witness for himself to such an extent as to authorize his examination or cross-examination as in the case of witnesses testifying under oath. The correct principle is, in our judgment, that while the jury can not arbitrarily or capriciously discard it, any more than they can technical evidence, "the statement" is entitled only to such weight, in influencing their verdict, as they may, in good conscience and justice, see fit to give it. Clearly it is not necessary that it should be corroborated by other independent testimony in order to authorize the jury to believe it. The charge given by the court was not in conflict with these views, and was correct. It can not be properly maintained, as insisted by the charge requested by defendant, that his unsworn statement is entitled, as matter of law, to the same credit as if it had been made under oath. Such an arbitrary rule would be an improper infringement upon the province of the jury, whose exclusive right it is to determine the weight of the evidence. It is true that the statement of one defendant, although not under oath, may, in certain cases, be more credible than that of another defendant who is under oath. This, however, is not the conception involved in the charge under consideration. An oath involves the idea of calling upon Deity to witness what is averred as truth, and it is supposed to be accompanied with an invoking of his vengeance, or a renunciation of his favor, in the event of falsehood. Its purpose is to purge the conscience, and impress the witness with a due sense of religious obligation, so as

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to secure the purity and truth of his testimony under the influence of its sanctity. When subjected to the sanction of an oath, moreover, and formally sworn, a witness is exposed to the penalty of a prosecution for perjury, if he testify falsely and corruptly. The General Assembly, in the enactment of this statute, has seen fit to remove this temptation to perjury by permitting the statement to be made not under oath. It certainly can not be said, as matter of law, that the absence of the oath shall not authorize the jury to consider the statement less credible than if it were legally made under the sanction of an oath. "There can be no test," say the Supreme Court of Michigan, in commenting on a similar statute in that State, "for the comparative weight which the statement or the sworn evidence shall have with the jury, but the greater or less conviction of its truth, which either may, in fact, produce upon their minds, after taking into consideration the temptation under which the defendant is placed in making his statement, and all the evidence and circumstances of the case."—*Durant v. The People*, 13 Mich. 351, 356.

These views are fully supported by authority. A statute existing in the State of Michigan provides that defendants, in criminal cases, "shall be at liberty to make a statement to the court or jury, and may be cross-examined upon such statement." Compiled Laws (Mich. 1871) Vol. 2, p. 1715–16. The decisions of the Supreme Court of that State, construing this statute, are in full accord with the above views.—*People v. Arnold*, 40 Mich. 710; *People v. Jones*, 24 Mich. 215; *DeFoe v. People*, 22 Mich. 224; *Durant v. People*, 13 Mich. 351, *supra*.

We find no error in the record and the judgment is affirmed.

Blackburn's case, *supra*; *Beasley's case*, *post*, p. 328, and *Chappell's case*, *infra*, were considered together, and were decided at the same time; and hence, the reference in each case to the others.—REP.

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Indictment for Burglary.

1. *Act allowing defendants in criminal cases to make statements construed.*—By the act of December 2nd, 1882 (Pamph. Acts, 1882–3, p. 4), authorizing defendants in criminal cases to make statements in their own behalf, the legislature did not intend to allow them to become witnesses, or their statements to become evidence.

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2. *Same; how statements should be considered by jury.*—The jury can not, however, wantonly and capriciously disregard a statement made by a defendant under the statute in their deliberations; but they must consider it in connection with the evidence in the cause, and give to it such weight, and only such weight, as its own inherent force, or corroborating proofs authorize.

3. *Same; defendants can not be examined or cross-examined.*—Defendants in criminal cases can not be examined by their counsel or cross-examined by the State, when they make their statements under the statute.

4. *Same; defendants can not be impeached.*—While the statements may be subjected to all the tests for ascertaining truth, which spring out of the proof in the cause, such as the consistency or probability *vel non* of the statements, the defendants' manner in making the statements, and the interest they must feel in the result, the defendants can not be impeached, as witnesses may be, by proof of bad character, by cross-examination, nor by any other proof of extrinsic facts, introduced for such purpose.—(SOMERVILLE, J., not expressing an opinion as to the right to impeach defendants by proof of bad character.)

APPEAL from Jefferson Circuit Court.

Tried before Hon. S. H. SPROTT.

At the spring term, 1883, of said court, Alvin Chappell, the defendant, was indicted for burglary, and at the same term was tried and convicted. On the trial, as shown by the bill of exceptions, "the defendant went on the stand and made a statement of the facts of the case in his own behalf. After he had finished his statement, his attorney asked him, whether he had ever claimed the property alleged to have been stolen, and which was lost from the house alleged to have been broken into and entered. He answered that he had made no such claim. The solicitor for the State then asked him, whether he had been convicted and sentenced to the penitentiary, and whether he had not worked out the sentence in the coal mine." This question he answered in the affirmative. The defendant, by his counsel, objected to the question and to the answer, but the court overruled both objections, and "allowed the said answer to go to the jury as evidence," and the defendant duly excepted. The foregoing is the substance of all that is contained in the bill of exceptions.

Name of counsel for appellant not disclosed by the record.

H. C. TOMPKINS, Attorney-General, for the State, cited *Hanroff v. The State*, 37 Ohio St. 178; *Brandon v. The People*, 42 N. Y. 265; *State v. Cohn*, 9 Nev. 179; *State v. Witham*, 72 Maine, 531.

STONE, J.—The present case raises a single question—the construction of the act approved December 2, 1882—Pamph. Acts, 4. By that statute it was enacted, "That on the trial of

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all indictments, complaints, or other criminal proceeding, it shall be competent for defendants to make a statement as to the facts in their own behalf, but not under oath." What are the scope and interpretation of this statute? Its language should be first considered.

The statement is to be made without oath. In all civilized communities, some ceremony or solemn act is prescribed, as a condition precedent to giving testimony. In nations or states professing the Christian religion, there is an appeal to Almighty God, or an adjuration on the Holy Evangelists, that the testimony to be given shall be the truth. This is a most solemn recognition of an All-seeing, Omnipotent Ruler, who will reward or punish in this world, or the next, according to the deeds done in the body. This is the sanction which the law exacts, and imposes upon the conscience, before it permits a witness to testify.—1 Greenl. Ev. § 328. In fact, every instrumentality connected with the administration of the law, is required to be oath-bound. Such has been the law as far back as our knowledge of English jurisprudence extends.

In addition to the sense of Divine accountability acknowledged in taking an oath, human law has denounced severe punishment against him who bears false witness. Perjury is conspicuous as the most common of all the degrading offenses which fall under the generic name of the *crimen falsi*, because it is so easy of perpetration. It tends to contaminate the very fountains of justice; and hence, the solemn sanctions which legislation and immemorial usage have thrown around the giving of evidence, which is to shape the destiny of life, liberty and property. To overturn a principle so ancient, and so deep-grounded in our jurisprudence, should require clear and explicit language.

Defendants may make a statement of the facts in their own behalf. To state, is defined to be, "To express the particulars of, in writing or in words; to place in mental view, or represent all the circumstances of modification; to make known specifically; to explain particularly." Applying the words of the statute to the case it was intended to meet: The prosecution first places before the jury the criminating facts and circumstances. Then the accused produces his exculpatory testimony, if he have any. He may then make a statement as to the facts, if he elect to do so. That is, he may give his version of the particulars; he may represent all the circumstances of modification; he may make known, or explain particularly and specifically, "but not under oath."

What we have said above is but a plain exposition of the language of the statute. Statutes, somewhat resembling ours, are found in other States. In most of them the provision is,

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that the defendant may make himself a witness in his own behalf, and must be sworn. In Michigan, unlike the statutes of the other States, their enactment, like ours, gives to the defendant the privilege of making a statement to the court or jury, "and [he] may be cross-examined upon any such statement." Nothing is said about being sworn or not; and the rulings under that statute are, that the statement of the prisoner is made without oath.—*Durant v. People*, 13 Mich. 351; *People v. Jones*, 24 Mich. 215; *DeFoe v. People*, 22 Mich. 224; *People v. Arnold*, 40 Mich. 710; see Code of Mich. 1871, Vol. 2, § 5967.

There have been many rulings on statutes similar to ours. In the case of *People v. Jones, supra*, the statement not being under oath, the court expressed its view of the construction of their statute, by approving a charge in the following language: "To determine the guilt or innocence of the accused, you may and should take into consideration all the facts and circumstances, as they appear to you from the proofs in the case. And, in connection with all the other proofs in the case, you have a right to take into consideration the statement of the prisoner, and give it such weight and credit as you think it entitled to, under all the facts and circumstances of the case. And you may give it more weight than the sworn testimony of unimpeached witnesses, if, under all the facts and circumstances of the case, you honestly believe it entitled to such weight; but in order to find what weight you ought to give to his statement, you should consider whether it is consistent with the other facts which may have been proven to your satisfaction, and whether his statement is corroborated or not by other proofs, facts, or circumstances of the case." The Michigan court, in its opinion, after approving the foregoing charge, added: "Such a statement, not being upon oath, and being made under very strong temptation to favor himself, should be subjected, at least, to all the scrutiny to which sworn testimony is subject." And in *People v. Arnold*, 40 Mich. 710, the same court, in 1879, said: "The law allows such weight to be given to the statement [of the accused], as the jury may consider due to it, and it can not be assumed by the judge, on submitting it, that it is not to be believed; and hence it is not competent to lead the jury to suppose that they may reject the facts given in the statement, simply because they are not proved by others." The Michigan statute, it will be remembered, allowed cross-examination.

The Florida statute allowed the defendant to make a statement on oath. In *Miller v. The State*, 15 Fla. 577, and in *Barber v. The State*, 13 Fla. 681, the court said: "It is the jury alone who are entitled to consider the statement, and if it

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be remarked upon at all, it should be to suggest to the jury, in effect, that they are to attach to it such importance, in view of the nature of the offense charged, and of the testimony before them, as in their good judgment it is entitled to. It is for their consideration alone, and they may disregard it entirely. . . The defendant is entitled, when permitted to make the statement, to the benefit or disadvantage of such impression as he may be able to make upon the judgment of the jury."

We have not been able to find the Georgia statute in our library, but from a remark of the court in *Brown v. The State*, 60 Ga. 210, we infer the statement was to be made without oath. That court said: "The statute says the statement is to have such force only as the jury think proper to give it. Doubtless, the object of the statement is to enable the jury better to understand the testimony. Still, the effect which they think proper to give it is the effect which it is to have. Of course, the jury should not lose sight of the terms of their oath. They swear to give a true verdict according to the evidence, and this they should do. . . As a general rule, sworn evidence must be more trustworthy than the prisoner's bare word." In the older case of *Ross v. The State*, 59 Ga. 248, the same court, in speaking of the same statute, had said: "We see no error in the charge that the statement of the prisoner was not evidence, but was entitled only to such weight as they chose to give it." So, in *Miller v. The State*, 15 Fla. 577, although the accused was required to make his statement on oath, the court ruled that he did not thereby become a witness.

The statutes of the other States generally make the accused a witness in his own behalf, if he choose to testify; and even the statute of Michigan, which required no oath, subjected the defendant, if he made a statement, to a cross-examination. *State v. Witham*, 72 Me. 531; *People v. Brown*, 72 N. Y. 571; S. C. 28 Amer. Rep. 183; *State v. Clinton*, 67 Mo. 380; S. C. 29 Amer. Rep. 506; *State v. Cohn*, 9 Nev. 179; *Hanoff v. The State*, 37 Ohio Stat. 178.

Recurring to our statute, copied above, we may well ask, why was the legislature so guarded in the language it employed. "Make a statement as to the facts in their own behalf, but not under oath," is the language of the statute. Witness, evidence, testimony are ignored, and oath is named only to be interdicted. If the legislature had intended to allow defendants to become witnesses, or their statements to become evidence, it was easy to say so, and we think it would have been said. We can not think such was their intention; at least, in a legal sense.

But, when we have reached this conclusion, we do not mean to say the jury can wantonly and capriciously disregard the

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statement in their deliberations. They must consider it in connection with the evidence in the cause, and give to it such weight, and only such weight, as its own inherent force, or corroborating proofs entitle it to. It is, in its nature, more like an explanation or excuse any one may offer, in refutation of criminating facts and circumstances, proved against, or pointing to him. They rest on their own intrinsic merits, their probability, reasonableness, consistency with the facts in the case, proven to the satisfaction of the jury, or on corroboration, sustained by satisfactory proof. If they can not bear the test of close scrutiny, they should, as a rule, be disallowed. They are in the nature of testimony, but it should never be overlooked that they come from a deeply interested source, and unvouched by solemn oath. We think the language of the Supreme Court of Georgia, to the extent we have copied it above, truly expresses the scope and meaning of our statute.—*Blackburn v. The State*, ante, p. 319.

Defendants thus making statements, not being witnesses, nor their statements strictly evidence, it results,

First: That they are not subject to examination, or cross-examination, as witnesses are.

Second: While their statements may be subjected to all the tests for ascertaining truth, which spring out of the proof in the cause, the consistency or probability *vel non* of the statements made, the defendants' manner in making the statements, and the interest they must feel in the result, they can not be impeached, as witnesses are, by proof of bad character, by cross-examination, nor by any other proof of extrinsic facts, introduced for such purpose.

Statements under the statute are the subject of legitimate comment by counsel, in addressing the jury.—*Beasley v. The State*, post, p. 328.

The Circuit Court erred in allowing counsel either to examine, or cross-examine the defendant.

Reversed and remanded. Let the accused remain in custody until discharged by due course of law.

SOMERVILLE, J.—I concur in the conclusion reached that a defendant, in making his statement as to the facts in his own behalf, does not become a *witness* to all intents and purposes. If the General Assembly had intended this, nothing would have been easier than to have so declared in express terms. I also concur in the view that he can not be *examined as a witness* without his consent—this being really the sole question raised for our decision by the record. By making his statement he does not necessarily waive the privilege of refusing to criminate himself, which is a constitutional, as well as common law right.

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If the right of cross-examination existed, as is expressly conferred by a similar statute in the State of Michigan, his appearance on the stand might very properly be construed as waiving this mere personal privilege.—*People v. Arnold*, 40 Mich. 710. Such are the rulings also under statutes authorizing defendants in criminal cases to testify as *witnesses* in their own behalf. *State v. White* (19 Kans. 445), S. C. 27 Amer. Rep. 137, *note*, 140. The specific question, as to whether or not it is permissible to weaken the statement of the defendant by proving him to be a person notoriously wanting in veracity, is one which does not arise in this case, and I prefer not to commit myself on it until it is presented for the decision of the court in proper form.

Beasley v. The State.

Indictment for Murder.

1. *Statement by defendant in criminal cases; its nature.*—While the statement made by a defendant in a criminal case is not technically evidence, in the broadest acceptation of the word, it is certainly “in the nature of evidence,” is made to the jury for their consideration, and is to be weighed by them, in connection with all the evidence, in determining the issue of guilt or innocence.

2. *Same; may be commented on by counsel.*—It is error for the primary court to refuse to permit the defendant’s counsel, in addressing the jury, to comment on such statement.

APPEAL from Madison Circuit Court.

Tried before Hon. H. C. SPEAKE.

The facts are sufficiently stated in the opinion.

L. P. WALKER and R. BETTS, for appellant, cited 1 Greenl. on Ev. Ch. 1, § 1; 1 Starkie on Ev. p. 9; 1 Best on Ev. p. 32, § 33; 2 Hale P. C. 283; 4 Black Com. 359–60; *Queen v. Malings*, 8 Car. & P. 242 (34 Eng. C. L. 371); Con. Art. 1, § 7; *People v. Keenan*, 13 Cal. 581; *Word v. Commonwealth*, 3 Leigh, 743; *Commonwealth v. Porter*, 10 Met. (Mass.) 263.

H. C. TOMPKINS, Attorney-General, for the State. (No brief came to the hands of the reporter.)

BRICKELL, C. J.—The constitution guarantees to every one, charged with the commission of a criminal offense, the right to be heard by himself and counsel. The guaranty did not au-

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thorize the accused for himself, and in his own behalf, to make a statement of facts to the jury.—*State v. McCall*, 4 Ala. 643. This privilege is conferred by the statute, approved December 2d, 1882.—Pamph. Acts 1882–3, p. 4. The error now complained of is, that the appellant, charged with the crime of murder, having exercised the privilege, and made before the jury a statement of facts, the court refused to permit his counsel, in addressing the jury, to comment upon the statement. We are of opinion the Circuit Court erred. It is the right of the accused to be heard by counsel on the whole case, on all its facts and circumstances. The statement of the accused, though not under oath, though he is not subject to cross-examination, though he is not, strictly speaking, a witness, and though it may not answer to the technical definition of evidence, in the broadest acceptance of the word, is certainly “in the nature of evidence,” is made to the jury, is for their consideration, and is to be weighed by them, in connection with all the evidence, in determining the issue of guilt or innocence.—*Blackburn's case*, ante, p 319; *Chappell's case*, ante, p. 322. It would be lessened in value, if the counsel had not the liberty of discussing and examining it in the light of all the facts; of comparing it with the evidence proceeding from the sworn witnesses; of pointing out its consistency or inconsistency with the evidence; of drawing attention to any explanation made by the accused of circumstances seemingly unfavorable to him. There is nothing in the statute warranting the supposition, that it is not, like any and every other fact and circumstance in the case, the subject of free comment and discussion by counsel. In England a defendant, accused of felony, has been permitted, at the close of the evidence, to give his own account of any relevant facts, though he is not subject to cross-examination; and upon his statement his counsel is allowed to comment, as one of the circumstances of the case.—*Regina v. Malings*, 8 C. & P. 242, cited in note 5, Whart. Cr. Ev. § 427.

The error compels a reversal of the judgment of the Circuit Court, and the cause must be remanded. Let the prisoner remain in custody, until discharged by due course of law.

Storey v. The State.

Indictment for Murder.

1. *Indictment for murder; verdict not specifying degree of homicide will not support conviction.*—Under an indictment for murder, a general ver-

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dict of guilty, which does not find the degree of the homicide, will not support a judgment of conviction.

2. *Oath to jury; when insufficient.*—The settled rule is that where the judgment-entry in a criminal case purports to set out the full oath administered to the jury trying the cause, it must express every essential element or ingredient of the oath, as prescribed by statute (Code of 1876, § 4765); and hence, a recital in such judgment-entry that the jury were “sworn and charged well and truly to try the issue joined,” omitting the words, “and a true verdict render according to the evidence; so help you God,” is fatally defective.

3. *Same; when sufficient.*—But a recital in the judgment-entry that the “jury were duly sworn,” or “were sworn according to law,” is sufficient; and “it is the safer practice for the *nisi prius* courts to pursue.”

4. *Credibility of witness; when charge in reference to free from error.* It is error for the court to refuse a charge requested by a defendant in a criminal case, there being a conflict in the evidence, instructing the jury, that “if there is a conflict in the testimony of the witnesses offered by the State, and those offered by the defendant, the jury must determine which of said witnesses they will believe; and that in determining what weight they will attach to the testimony of any particular witness, they may look to the manner of such witness on the stand, and to his interest and feeling, if any, in the case, and as to whether or not he has been contradicted by other witnesses in the cause, or by his own previous statements.”

5. *Law of self-defense; accused must be free from fault.*—It is a fundamental principle of the law of homicide, when the doctrine of self-defense is invoked, that the accused must be free from fault in having provoked or brought on the difficulty in which the killing was perpetrated; if he himself was the aggressor, he can not be heard to urge, in his own justification, the necessity for the killing which was produced by his own wrongful act.

6. *Same; when duty of accused to retreat.*—Another important principle of the law of homicide, governing, at least, cases of mere assault, or of mutual combat, where the attacking party has not “the purpose of murder in his heart,” is, that the right of self-defense does not arise until the defendant has availed himself of all proper means in his power to decline the combat by retreat, provided there be opened to him a safe mode of escape.

7. *Same; when accused need not retreat.*—But where the assault is manifestly felonious in its purpose, and forcible in its nature, as in murder, rape, robbery, burglary, and the like, as distinguished from secret felonies, such as mere larceny from the person, etc., the party attacked is under no obligation to retreat; but he may, in such case, if necessary, stand his ground and kill his adversary.

8. *Same; law of, when accused assailed with deadly weapon.*—This principle, however, when applied to an attack made with a deadly weapon, must be limited to those cases, in which the attack with the deadly weapon is made under such circumstances as to reasonably justify the conclusion, that the party assailed, by retreating, will apparently put himself at a disadvantage.

9. *Same; reasonable belief of imminent peril, and of urgent necessity to take life.*—To enable one charged with homicide to make out a case of self-defense, the circumstances surrounding him at the time of the fatal act must be such as to have created in his mind a reasonable belief, well founded and honestly entertained, of his own present and immediate imminent peril, and of an urgent necessity to take the life of his assailant, as the only alternative of saving his own, or of preventing the infliction of great bodily harm; and of the existence of these facts the jury must be the judge.

10. *Personal property taken without criminal intent; law of recapture.*
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Where personal property is converted, or taken possession of in such manner as to constitute merely a civil trespass, without any criminal intent, it is not lawful to recapture it by the exercise of any force which would amount even to a breach of the peace, much less a felonious homicide.

11. *The right to take life to prevent the commission of a felony; limitation to rule.*—Although it has often been stated, in general terms, by text writers, and in many well considered cases, that one may “oppose another who is attempting to perpetrate *any felony*, to the extinguishment, if need be, of the felon’s existence,” the rule as thus stated is neither sound in principle, nor supported by the weight of modern authority; but the safe view is, that the rule does not authorize the killing of persons attempting *secret felonies*, not accompanied by *force*.

12. *Same; when the killing of one attempting to commit larceny of a horse, not justifiable.*—Where, on the trial of a prisoner for murder, one of the defenses relied on was, that he was in pursuit of the deceased, at the time of the homicide, for the purpose of recapturing a horse, which had been stolen from him by the deceased, and that the killing was necessary to a recovery of the horse, it being shown that the alleged larceny, if it occurred at all, was committed in the day time, and it not being shown that the prisoner was unable to obtain his redress at law,—*held*, that the refusal of the court to charge the jury, at the prisoner’s request, that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity for killing the deceased, in order to recover the horse, and prevent the consummation of the larceny, the homicide would be justifiable, is free from error, although the larceny of a horse, without regard to value, is a felony under the statute.

13. *Right of pursuit and recapture of stolen property, as applicable to law of homicide.*—If, however, the horse was in fact stolen by the deceased, the prisoner, or any other person, without informing the deceased of his purpose, had the right to pursue him for the purpose of arresting him, and of recapturing the stolen property; and, if resisted, had the right to repel force by force, and was not required to give back or retreat; and if, under such circumstances, the deceased was killed, the homicide would be justifiable.

14. *Same.*—If, in such case, the prisoner’s purpose was honestly to make pursuit, he would not for this reason be chargeable with the imputation of having wrongfully brought on the difficulty; but the law would not permit him to resort to the pretense of pursuit, as a mere colorable device, beneath which to perpetrate crime.

15. *Character of deceased; when a vital issue.*—While “no one can, without lawful excuse, kill a blood-thirsty ruffian any more than he can the most orderly citizen;” yet, an overt act done by the former may reasonably justify prompter action, as a necessary means of self-preservation, than if done by the latter; and hence, in all cases of homicide, in which an issue of self-defense properly arises, the character of the deceased is a vital issue.

APPEAL from Talladega Circuit Court.

Tried before Hon. LEROY F. BOX.

At the July term, 1881, of said court, Phil, *alias* Philip Storey, and William Storey, were jointly indicted for the murder of Josiah Hall; and at a subsequent term they were tried, the jury returning the following verdict, as recited in the judgment-entry: “We, the jury, find the defendant William Storey not guilty, and find the defendant Philip Storey guilty, and sentence him to the penitentiary for two years.”

The evidence introduced on behalf of the State tended to

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show, that, on the morning of the — day of May, 1881, Philip Storey and Josiah Hall, the deceased, met at the store of one Thomas, in Talladega county, said Storey riding a horse and Hall, a mule; that Hall “endeavored” to trade his mule for Storey’s horse, but that no trade was then made, Storey on advice of Thomas leaving the store on his horse; that about two hours afterwards Storey “came by the house of McMerriam, a State’s witness,” riding a mule, and accompanied by his son, William Storey, a lad about seventeen years of age, and asked McMerriam, whether he had seen Josiah Hall pass that way, “stating that Hall had stolen his (Storey’s) horse, and he meant to get it back, or kill Hall;” that McMerriam having advised him to get a warrant of arrest for Hall, said Philip sent his son on the mule to the house of one Woods, a white man, and said Philip’s landlord, to ask him to come and aid him in recovering his horse; “he (Philip Storey) following on in the direction of Bobo’s, a justice of the peace;” that at a cross-road, in front of the house of one Sullivan, the deceased, who was riding the horse which Philip Storey had ridden to Thomas’ store that morning, and was going in the direction of Bobo’s, saw William Storey coming behind him on a mule, and said to him, with an oath, “are you following me up;” that William Storey said “halt,” and thereupon the deceased turned in his saddle, and fired at said William with a double-barrel shot-gun, shooting him “through the right shoulder just above the lungs;” that said William got down from the mule which he was riding, and fell, Hall going on in the direction of Bobo’s; and that said William was carried into Sullivan’s yard, and placed on a pallet. The evidence for the State further tended to show, that in a few minutes thereafter Philip Storey came up to the place where his son was lying, and, having been informed how the shooting occurred, said that he would kill Hall, “if he (Hall) was on top of dirt;” and asked some one to load his gun; that being informed that one barrel of his gun was loaded, and being advised to go to the house of Bobo, the justice of the peace, and get a warrant for Hall’s arrest, he started off in that direction; that a few minutes after he left, the deceased, Bobo, and one White rode up from the direction of Bobo’s house, and stopped in Sullivan’s yard; Bobo and White dismounting, but the deceased remaining on his horse, with his gun across his saddle in front of him; that about twenty minutes afterwards, one of a crowd who had gathered around the place where William Storey was lying, exclaimed, “yonder comes Phil,” and “in an instant Philip Storey came around Sullivan’s house and dismounted,” and waving his hand, said “clear the way :” and that the deceased also dismounted. Who dismounted first, Philip Storey, or the deceased, the testimony of the State’s

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witnesses was conflicting, some testifying that the former, others that the latter did. The evidence for the State further tended to show that when both had dismounted, Philip Storey advanced on Hall, who was standing by the horse he had been riding, with his gun across the horse's haunches; "that Hall moved his horse about to keep an obstruction between himself and Philip; that when Philip got around the head of the horse, Hall turned and ran towards Sullivan's door; that Philip fired and shot Hall in the back below the right shoulder, and Hall fell, and immediately after he fell, Philip struck him on the head with his gun; that when Philip came up and dismounted, William Storey cried out, 'shoot him, father, he has killed me;' that after Philip fired and Hall fell, William ran and grabbed Hall's gun, and struck him a blow on the neck, fracturing the stock of the gun; that Josiah Hall died in a short while from the effects of said wounds;" and that Philip Storey, on being immediately thereafter arrested by Bobo, said, with an oath, that he had done what he had come there to do. "The State proved further by a brother-in-law of Hall, that that morning, before the shooting of William Storey, Hall had told witness that he had traded horses with Philip Storey, and had paid him \$15 to boot; that Philip was dissatisfied, and he gave him another dollar, and that Philip wadded up all the money, and threw it into the creek, demanding his horse back; and that Hall said that Philip Storey and his boy were after him, and he was going to get a peace warrant for them from Bobo." It was also shown that several of the State's witnesses had testified touching the circumstances attending the killing of the deceased, on a preliminary examination, and that their testimony on that examination "was contradictory of their present testimony in many important particulars."

"The evidence for the defendants tended to show that on the day of the shooting, Hall came up to the fence where two of defendants' witnesses were at work, and asked where Philip Storey was; that when informed that witnesses did not know, Hall said, 'Phil has told me that he was going to get a warrant for me for stealing his horse, but,'" with an oath, "'I am going to kill him before he does it,' and Hall then rode off; and that shortly afterwards Philip Storey came up, and was told by witnesses what Hall had said." The evidence for the defendants further tended to show that, upon some one in the crowd around the place where William Storey was lying in Sullivan's yard, saying, "Yonder comes Phil," Hall "dismounted from Philip Storey's horse, which he was riding, and made preparation to shoot, as Philip Storey was dismounting; that he cocked his gun before Philip Storey got down from the mule he was riding, and that he snapped a cap on the barrel of his

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gun before Philip Storey shot;" that "the door of Sullivan's house, towards which Hall had turned, or was in the act of turning, when Philip fired, was only two or three steps from where Hall had been standing when he cocked his gun and laid it over his horse as Philip came up;" that during the encounter between Philip Storey and Hall, William Storey was lying on the pallet in Sullivan's yard, "in a semi-conscious state, and did not rise therefrom, or strike Hall," and was then physically unable to have dealt the blow testified to by the State's witnesses. The testimony for the defendants further tended to show that "Philip Storey was and has been all his life of good character, peaceable, quiet and inoffensive; and that Josiah Hall was a man of very bad character—a quick, revengeful, desperate, dangerous, violent, and turbulent man, and was so considered by all who knew him." The bill of exceptions also contains this statement: "The defendants' evidence tended to show that Philip Storey did not provoke the difficulty, and, at the time of the killing of Hall, was acting in self-defense; that of the State tended to show that Philip Storey did provoke the difficulty, and that Hall was retreating when Philip Storey shot him." The killing was shown to have been done in Talladega county, and before the finding of the indictment. The foregoing, as recited in the bill of exceptions, "was, in substance, all the evidence tended to show."

After the general charge, to which no exceptions were taken, had been delivered, the Circuit Court gave to the jury, at the request of the State's solicitor, nine charges, to the giving of which the appellant duly excepted. He also reserved exceptions to the refusal of the court to give eight charges requested by the defendants. Among the charges requested by the defendant and refused by the court was one instructing the jury, in substance, that the defendant had the right to show the violent, dangerous, overbearing and turbulent character of the deceased, if he could, for the purpose of illustrating his own conduct in shooting the deceased; and that, if they find that Hall was a man of such bad character, "then defendant was authorized to act upon less appearances of an intention to harm him, than would usually justify him." The purport of the other charges to which exceptions were reserved, and the questions raised by the rulings thereon, so far as passed on by this court, are sufficiently indicated in the opinion.

HEFLIN, BOWDEN & KNOX and PARSONS & PARSONS, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

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(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The judgment of conviction in this case must be reversed because of several errors apparent in the record.

In the first place, the verdict of the jury finds the defendant guilty generally, without *specifying the degree of the homicide*. The Code requires that “when the jury find the defendant guilty, under an indictment for murder, *they must ascertain, by their verdict, whether it is murder in the first or second degree.*”—Code, 1876, § 4299. Our decisions have been uniform in holding that no judgment of conviction, under an indictment for murder, can be sustained, unless the verdict of the jury expressly finds the degree of the crime of which the defendant is convicted.—*Levison v. The State*, 54 Ala. 520; *Field's case*, 47 Ala. 603; *Murphy's case*, 45 Ala. 32; *Hall's case*, 40 Ala. 698; *Cobia v. The State*, 16 Ala. 781.

The oath of the jury was, furthermore, defective, as it appears in the record. The recital is, that they were “sworn and charged *well and truly to try the issue joined.*” The record thus purports to set out the whole oath, and fails to do so by omitting a material part of it. The omitted phrase—“and a true verdict render according to the evidence, so help you God”—is an essential ingredient, being expressly required by statute.—Code, § 4765. The past rulings of this court on this subject are irreconcilably conflicting, as will appear from the cases cited in Clark's Cr. Dig. § 574; and Clark's Man. Cr. Law, §§ 2136, 2960. We adhere, however, to the more recent rulings, as declared in the cases of *Allen v. The State*, ante, p. 5, and *Schamberger v. The State*, 68 Ala. 543. The rule, as there settled, is that where a judgment entry purports to set out the full oath administered to the jury, it must express every *essential element or ingredient of such oath*, as prescribed by the statute. But a recital that the jury “were duly sworn,” or were “sworn according to law” is clearly sufficient, and we have often said that it is the safer practice for the *nisi prius* courts to pursue.—*Roberts v. The State*, 68 Ala. 515; *Mitchell's case*, 58 Ala. 417; *Moore's case*, 52 Ala. 424; *Smith's case*, 53 Ala. 486; Clark's Cr. Dig. § 574; *Commander v. The State*, 60 Ala. 1.

The prisoner, as shown by the bill of exceptions, requested the court to give the following written charge, which was refused: “If there is a *conflict in the testimony* of the witnesses offered by the State, and those offered by the defendants, *the jury must determine* which of said witnesses they will believe; and in determining *what weight* they will attach to the testimony of any particular witness, they may look to *the manner*

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of such witness on the stand, and to *his interest and feeling* (if any) in the case, and as to whether or not he *has been contradicted by other witnesses* in the cause, or by *his own previous statements*." The refusal of this charge was clearly erroneous. It always falls within the province of a jury to determine the weight and sufficiency of the evidence, including the credibility of the various witnesses.—1 Greenl. Ev. § 49; *Myers' case*; 62 Ala. 599; *Alsabrooks' case*, 52 Ala. 24. This must be done, however, "under such instructions, as to the reason of the case, as may be given by the court."—Whart. Cr. Ev. § 384. The usual tests of credibility are various, and need not be here enumerated, but among these may very certainly be included the *manner of the witness* on the stand; his state of prejudice as affected by *interest or feeling* evinced in behalf of either party; *the consistency of his statements* with those of *other witnesses* examined in the cause, or their repugnancy or harmony with *his own previous statements* made in the cause, or elsewhere. The charge recognized these elementary principles, and should have been given.—Whart. Cr. Ev. §§ 373, 354; 1 Greenl. Ev. §§ 461, *et seq.*

It is one of the fundamental principles of the law of homicide, whenever the doctrine of self-defense arises, that the accused himself *must always be reasonably free from fault*, in having provoked or brought on the difficulty in which the killing was perpetrated. If the accused was the aggressor, it is well settled that he can not be heard to urge, in his own justification, a necessity for the killing which was produced by his own wrongful act.—*Cross' case*, 63 Ala. 40; *Kimbrough's case*, 62 Ala. 248; Whart. on Hom. § 535. Or, as sometimes stated, no one can avail himself of a necessity which he has knowingly and willfully brought on himself."—*Leonard's case*, 66 Ala. 461; 1 Bish. Cr. Law, § 844. Many of the numerous charges requested by the prisoner, as will readily appear from inspection, were properly refused on the ground that they ignored this preliminary principle.

It is another important rule in such cases, that the right of self-defense does not arise until the defendant has availed himself of all proper means in his power *to decline the combat by retreat*, provided there be open to him a safe mode of escape. *Ingram's case*, 67 Ala. 67; *Eiland's case*, 52 Ala. 322. Such, at least, is the settled principle governing cases of mere assault, or of mutual combat, where the attacking party, as expressed by Mr. Bishop, has not "*the purpose of murder* in his heart." 1 Bish. Cr. Law, § 850. Where, however, the assault is manifestly *felonious in its purpose and forcible in its nature*, as in murder, rape, robbery, burglary, and the like, as distinguished from *secret felonies*, like mere larceny from the person, or the

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picking of one's pocket, the party attacked is under no obligation to retreat. But he may, if necessary, stand his ground and kill his adversary.—Cases on Self-Defence (Horr. & Thomp.), pp. 33, 133, 139; *Selfridge's case*, *Ib.* 1; *State v. Shippey*, 10 Minn. 223; 1 Bish. Cr. Law, § 850; *Aaron v. The State*, 31 Ga. 167; 1 East P. C. 271. Mr. Bishop observes, that “it is the same *where the attack is with a deadly weapon*; for, in this case, the person attacked may well assume that the other intends murder, whether he does in fact or not.”—1 Bish. Cr. L. § 850. This observation, however, must be limited to those cases where the attack with the deadly weapon is made under such circumstances or surroundings as to reasonably justify the conclusion that the party assailed, by retreating, will apparently put himself at a disadvantage; for, as Mr. Blackstone has it, he should retreat “as far as he *conveniently and safely* can to avoid the violence of the assault, before he turns on his assailant.” 4 Com. 184; Whart. on Hom. § 485; *Selfridge's case*, *supra*; Cases on Self-Defence, 64, 121, 130. Mr. East states the doctrine as follows: “A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends, or endeavors, *by violence or surprise*, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases *he is not obliged to retreat*, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defense.”—1 East P. C. 271.

Of course, where one is attacked in his own dwelling-house, he is never required to retreat. His “house is his castle,” and the law permits him to protect its sanctity from every unlawful invasion.—Whart. on Hom. § 541; *Pond's case*, 8 Mich. 150; 1 Russ. Cr. 544.

These principles are of easy application to the evidence, and some of the charges were misleading in failing to clearly recognize them.

The law requires that the circumstances surrounding the prisoner should have created in his mind *a reasonable belief of his own imminent peril*, and of *an urgent necessity to take the life* of his assailant, as the only apparent alternative of saving his own life, or else of preventing the infliction of great bodily harm. Such peril must be, to all appearances, present and immediate, and the belief in the necessity of killing must be well founded and honestly entertained; and of these facts the jury must be the judge.—*Carroll's case*, 23 Ala. 28; *Oliver's case*, 17 Ala. 587; *Ex parte Brown*, 65 Ala. 446; Cases on Self-Def. (Horr. & Thomp.), 345, 349, 476, 820; Whart. on Hom. § 517 *et seq.*; *Mitchell's case*, 60 Ala. 26; *Robert's case*, 68 Ala. 156.

The charges given by the court fully recognize this principle.

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The record contains some evidence remotely tending to show that the prisoner was in pursuit of the deceased for the purpose of recapturing a horse, which the deceased had either *stolen*, acquired by *fraud*, or else unlawfully *converted* to his own use.

If the property was merely converted, or taken possession of in such manner as to constitute a civil trespass, without any criminal intent, it would not be lawful to recapture it by any exercise of force which would amount even to a breach of the peace, much less a felonious homicide.—*Street, v. Sinclair, ante*, p. 110; *Burns v. Campbell, ante*, p. 271.

Taking the hypothesis that there was a *larceny* of the horse, it becomes important to inquire what would then be the rule. The larceny of a horse is a *felony* in this State, being specially made so by statute, without regard to the value of the animal stolen.—Code, 1876, § 4358. The fifth charge requested by the defendant is an assertion of the proposition, that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity for killing deceased in order to recover the property and prevent the consummation of the felony, the homicide would be justifiable. The question is thus presented, as to the circumstances under which one can kill in order to prevent the perpetration of a larceny which is made a felony by statute—a subject full of difficulties and conflicting expressions of opinion from the very earliest history of our common law jurisprudence. The broad doctrine intimated by Lord COKE was, that a felon may be killed to prevent the commission of a felony without any inevitable cause, or as a matter of mere choice with the slayer.—3 Inst. 56. If such a rule ever prevailed, it was at a very early day, before the dawn of a milder civilization, with its wiser system of more benignant laws; for Blackstone states the principle to be, that “where a crime, in itself *capital*, is endeavored to be committed *by force*, it is lawful to *repel that force* by the death of the party attempting.” 4 Com. 181. The reason he assigns is, that the law is too tender of the public peace and too careful of the lives of the subjects to “suffer, with impunity, any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death.” It must be admitted that there was far more reason in this rule than the one intimated by Lord COKE, although all felonies at common law were punishable by death, and the person killing, in such cases, would seem to be but the executioner of the law. Both of these views, however, have been repudiated by the later authorities, each being to some extent materially modified. All admit that the killing can not be done from *mere choice*; and it is none the less certain that the felony *need not be a capital one* to come within the scope of the rule. *Gray v. Combs*, 7 J. J. Marsh. 478; Cases on Self-Defence (Horr.

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& Thomp.), 725, 867; *Oliver v. The State*, 17 Ala. 587; *Carroll v. The State*, 23 Ala. 28.

We find it often stated, in general terms, both by text writers and in many well considered cases, that one may, as Mr. Bishop expresses it, "oppose another who is attempting to perpetrate *any felony*, to the extinguishment, if need be, of the felon's existence."—1 Bish. Cr. Law, §§ 849-50; *The State v. Rutherford*, 1 Hawks, 457. It is observed by Mr. Bishop, who is an advocate of this theory, that "the practical carrying out of the right thus conceded, is, in some circumstances, *dangerous*, and wherever admitted, it *should be carefully guarded*." 1 Bish. Cr. Law, § 855.

After a careful consideration of the subject we are fully persuaded that the rule, as thus stated, is neither sound in principle, nor is it supported by the weight of modern authority. The safer view is that taken by Mr. Wharton, that the rule *does not authorize the killing of persons attempting secret felonies, not accompanied by force*.—Whart. on Hom. § 539. Mr. Greenleaf confines it to "the prevention of any *atrocious crime* attempted to be *committed by force*; such as murder, robbery, house-breaking in the night-time, rape, mayhem, or any other act of felony against the person" (3 Greenl. Ev. 115); and such seems to be the general expression of the common law text writers.—1 Russ. Cr. 665-70; 4 Black. Com. 178-80; Whart. Amer. Cr. Law, 298-403; 1 East P. C. 271; 1 Hale, P. C. 488; Foster, 274. It is said by the authors of Cases on Self-Defence, that a killing which "appears to be reasonably necessary to prevent a *forcible and atrocious* felony against property, is justifiable homicide." "This rule," it is added, "the common law writers do not extend to *secret felonies*, or felonies not accompanied with force," although no modern case can be found expressly so adjudging. They further add: "It is pretty clear that the right to kill in defense of property *does not extend to cases of larceny*, which is a crime of a secret character, although the cases which illustrate this exception are generally cases of theft of articles of small value."—Cases on Self-Defence (Horr. & Thomp.), 901-2. This was settled in *Reg. v. Murphy*, 2 Crawf. & Dix C. C. 20, where the defendant was convicted of shooting one detected in feloniously carrying away fallen timber which he had stolen from the premises of the prosecutor, the shooting being done very clearly to prevent the act, which was admitted to be a felony. DOHERTY, C. J., said: "I can not allow it to go abroad that it is lawful to fire upon a person committing a trespass and larceny; for that would be punishing, perhaps with death, offenses for which the law has provided milder penalties." This view is supported by the following cases: *State v. Vance*, 17 Iowa, 144; *McClelland v. Kay*,

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14 B. Monroe, 106, and others not necessary to be cited. See Cases on Self-Defence, p. 901, *note*.

There is no decision of this court, within our knowledge, which conflicts with these views. It is true the rule has been extended to statutory felonies, as well as felonies at common law, which is doubtless the correct doctrine, but the cases adjudged have been open crimes committed by force, and not those of a secret nature.—*Oliver's case*, 17 Ala. 587; *Carroll's case*, 23 Ala. 28; *Dill's case*, 25 Ala. 15.

In *Pond v. The People*, 8 Mich. 150, after endorsing the rule which we have above stated, it was suggested by CAMPBELL, J., that there might possibly be some "exceptional cases" not within its influence, a proposition from which we are not prepared to dissent. And again in *Gray v. Combs*, 7 J. J. Marsh. 478, 483, it was said by NICHOLAS, J., that the right to kill in order to prevent the perpetration of crime should depend "more upon the character of the crime, and the *time and manner* of its attempted perpetration, than upon the degree of punishment attached by law." There is much reason in this view, and a strong case might be presented of one's shooting a felon to prevent the asportation of a stolen horse in the *night time*, where no opportunity is afforded to recognize the thief, or obtain speedy redress at law. Both the Roman and Athenian laws made this distinction in favor of preventing the perpetration of theft by night, allowing, in each instance, the thief to be killed when necessary, if taken in the act.—4 Black. Com. 180, 181.

The alleged larceny in the present case, if it occurred at all, was in the open daylight, and the defendant is not shown to have been unable to obtain his redress at law. Where opportunity is afforded to secure the punishment of the offender by due course of law, the case must be an urgent one which excuses a killing to prevent any felony, much less one not of a forcible or atrocious nature.—Whart. Hom. §§ 536–8. "No man, under the protection of the law," says Sir MICHAEL FOSTER, "is to be the avenger of his own wrongs. If they are of such a nature for which the law of society will give him an adequate remedy, thither he ought to resort."—Foster, 296. It is everywhere settled that the law will not justify a homicide which is perpetrated in resisting a mere civil trespass upon one's premises or property, unaccompanied by force, or felonious intent.—*Carroll's case*, 23 Ala. 28; Clark's Man. Cr. Law, §§ 355–7; Whart. on Hom. § 540. The reason is that the preservation of human life is of more importance than the protection of property. The law may afford ample indemnity for the loss of the one, while it utterly fails to do so for the other.

The rule we have above declared is the safer one, because it

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better comports with the public tranquility and the peace of society. The establishment of any other would lead to disorderly breaches of the peace of an aggravated nature, and therefore tend greatly to cheapen human life. This is especially true in view of our legislative policy which has recently brought many crimes, formerly classed and punished as petit larcenies within the class of statutory felonies. It seems settled that no distinction can be made between statutory and common law felonies, whatever may be the acknowledged extent of the rule. *Oliver's case*, 17 Ala. 587; Cases on Self-Def. 901, 867; Bish. Stat Cr. § 139. The stealing of a hog, a sheep, or a goat is, under our statute, a felony, without regard to the pecuniary value of the animal. So would be the larceny of a single ear of corn, which is "a part of any outstanding crop."—Code, § 4358; Acts 1880–81, p. 47. It would be shocking to the good order of government to have it proclaimed, with the sanction of the courts, that one may, in the broad daylight, commit a willful homicide in order to prevent the larceny of an ear of corn. In our judgment the fifth charge, requested by the defendant, was properly refused.

It can not be questioned, however, that if there was in truth a larceny of the prisoner's horse, he, or any other private person had a lawful right to pursue the thief for the purpose of arresting him, and of recapturing the stolen property.—Code, §§ 4668–70; 1 Bish. Cr. Proc. §§ 164–5. He is not required, in such case, to inform the party fleeing of his purpose to arrest him, as in ordinary cases.—Code, § 4669. And he could, if resisted, repel force with force, and need not give back, or retreat. If, under such circumstances, the party making resistance is unavoidably killed, the homicide would be justifiable. 2 Bish. Cr. Law, § 647; 1 Russ. Cr. 665; *State v. Roane*, 2 Dev. 58. If the prisoner's purpose was honestly to make a pursuit, he would not for this reason be chargeable with the imputation of having wrongfully brought on the difficulty; but the law would not permit him to resort to the pretense of pursuit, as a mere colorable device, beneath which to perpetrate crime.

The character of the deceased was clearly a vital issue, as it is in all cases where an issue of *self-defense* properly arises. It was relevant as having a tendency to justify the belief in the prisoner's mind of a peril enhanced by the dangerous character of his assailant. A ferocious, vindictive and turbulent man is reputed to be such, because of the frequency with which he executes his revenge, or gives expression, by constant overt acts, to his animosity. A demonstration on his part, especially when preceded by recent and violent threats, may create reasonable apprehension of danger, when the same conduct on the part of

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a notoriously peaceable or timid man would be regarded as entirely harmless. It is quite true that no one can, without lawful excuse, kill a blood-thirsty ruffian any more than he can the most orderly citizen; but it is plain that an overt act done by the former may reasonably justify prompter action, as a necessary means of self-preservation, than if done by the latter. It may sometimes be as material to prove that a man, who assailed you, was a Thug in character, as that he was a Thug in reality. Whart. on Hom. § 606; *Robert's case*, 68 Ala. 156; *Pritchett's case*, 22 Ala. 39; *Dupree v. State*, 33 Ala. 38; *Franklin's case*, 29 Ala. 14; *Stokes' case*, 53 N. Y. 164; *Colton's case*, 31 Miss. 504; Cases Self-Defense (Horr. & Thomp.), pp. 486, 667, 641, 635, 927, 539.

There are some other questions raised in the record which we do not think necessary to discuss. The judgment of the Circuit Court must be reversed, and the cause remanded for a new trial. In the meanwhile, the prisoner will be retained in custody until discharged by due process of law.

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Indictment for Assault and Battery.

1. *Husband and wife; competency as witnesses for or against each other.* It must be regarded as settled, that when, in any case, husband and wife are competent witnesses against each other, they are also competent witnesses for each other.

2. *Same; when wife competent witness for husband in criminal case.* On the trial of the husband for an assault and battery on his wife, she is a competent witness for him.

APPEAL from Choctaw Circuit Court.

Tried before Hon. WILLIAM E. CLARKE.

The facts are sufficiently stated in the opinion.

L. R. SMITH, for appellant, cited 2 How. P. C. c. 46, § 70; 1 Greenl. Ev. § 343; 1 Phil. Ev. pp. 83-5; 2 Rus. on Cr. (5th Amer. Ed.), 986; *State v. Neill*, 6 Ala. 685; 4 Allen, p. 491.

H. C. TOMPKINS, Attorney-General, for the State. (No brief came to the hands of the reporter.)

BRICKELL, C. J.—The appellant was indicted for an assault and battery on Sallie Tucker, shown to have been his wife

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at the time the offense was charged to have been committed. At the trial, he called and offered his said wife as a witness in his favor; but, on motion of the solicitor, the Circuit Court excluded her; to which the appellant excepted, and, having been convicted, now claims the exclusion as error.

In civil suits, at law and in equity, the principle of the common law, founded on the unity of the marriage relation, the identity of interest existing between husband and wife, and upon considerations of public policy, disqualified them as witnesses for or against each other; and it was a rule, so inviolate that no consent would authorize its breach, that neither of them in any cause, civil or criminal, was permitted to give any testimony tending to criminate the other. In *Bently v. Cooke*, 3 Doug. 422, Lord MANSFIELD said, that there never had been any instance, in a civil or criminal case, where the husband or wife had been permitted to be a witness for or against each other, except in case of particular necessity, as where the wife would otherwise be exposed, without remedy, to personal violence. The necessity of protecting the wife from personal violence, and of preserving the public peace, was supposed to overbalance the principle of public policy, upon which the rule of exclusion was founded.—*People v. Mercein*, 8 Paige, 47. If the question were new, if it were not settled, then there would be room for just doubts, whether the exception could be so extended as to authorize the introduction of the wife as a witness for the husband, when he is charged with violence to her person. But it seems to be settled, as is stated by Mr. Greenleaf, that in all cases, where the wife may be called as a witness against the husband, she is a competent witness in his favor. 1 Greenl. Ev. § 336; Whart. Cr. Ev. § 394a; 3 Russ. on Cr. 633. In *Rex v. Serjeant*, Ryan & Moody, 352 (21 Eng. Com. Law, 453), it was said by ABBOTT, C. J., that there is no distinction between admitting a wife for and against her husband, that the principle is exactly the same. The question was determined by this court in *State v. Neill*, 6 Ala, 685, which, like the present case, was a prosecution of the husband for an assault and battery upon the wife. The court said: "Considered upon principle, we are unable to perceive any good reason why the wife, in such a case, should be excluded. The offer of the wife as a witness presupposes the case to be made out *prima facie* by other proof. But certainly the wife must know the fact better than any other person, and, if willing to be examined, ought to be permitted to testify." We think it must be regarded as settled, that when, in any case, husband and wife are competent witnesses against, they are admissible witnesses for, each other.

The Circuit Court erred in the exclusion of the wife as a

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witness, and because of the error, the judgment must be reversed and the cause remanded. The appellant will remain in custody, until discharged by due course of law.

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Indictment for Unlawfully and Knowingly Buying Cotton in the Seed, under Act of the Legislature, approved February 1st, 1879.

1. *Indictment; exceptions created by a proviso to an act need not be negatived.*—Where a proviso or exception is embodied in a separate clause of a penal statute, and not in the clause creating the offense, it is not necessary that an indictment founded on the statute should negative the proviso or exception.

2. *Same; when indictment in language of the statute insufficient.* While the general rule is, that where a new offense is created by statute, an indictment describing the offense in the language of the statute, or in words conveying the same meaning, is good, this is not sufficient, if such indictment fails to allege the fact, “in the doing or not doing of which the offense consists.”

3. *Indictment under act prohibiting the sale, etc., of cotton in Lowndes and other counties; what it should aver.*—An indictment under the act approved February 1st, 1879 (Pamph. Acts, 1878-9, p. 216), charging the defendant with unlawfully and knowingly buying cotton in the seed in Lowndes county, one of the counties named in the act, should allege either the name of the owner of the cotton purchased, or the name of the person from whom the purchase was made. Either averment would be sufficient to obviate any objection based upon a want of certainty in the statement of the offense.

4. *Same; when insufficient.*—Hence, an indictment in such case, which alleges neither the name of the owner of the cotton, nor the name of the person from whom it was purchased, is fatally defective.

APPEAL from Lowndes Circuit Court.

Tried before Hon. JOHN MOORE.

COOK & ENOCHS, for appellant, cited §§ 4785, 4789 and 4790 of the Code of 1876; Acts of 1878-9, p. 206; *Turnipseed v. The State*, 6 Ala. 664; *Williams v. The State*, 15 Ala. 259; *Beasley v. The State*, 18 Ala. 535; *Anthony v. The State*, 29 Ala. 27; 45 Ala. 86; 17 Ala. 181; 19 Ala. 586; 21 Ala. 218.

H. C. TOMPKINS, Attorney-General, for the State, cited Acts 1878-9, pp. 206-7; 1 Brick. Dig. p. 501, §§ 760-1; *Ib.* p. 499, § 734; *Murphy v. The State*, 6 Ala. 845; *People v. Caswell*, 21 Wend. 86; *Commonwealth v. Slate*, 11 Gray, 60; *State*

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v. Smith, 37 Mo. 58; *Rea v. Wheeler*, 7 C. & P. 170; 2 Whart. Crim. Law, § 1499.

SOMERVILLE, J.—The indictment charges that the defendant did “unlawfully and knowingly *buy cotton in the seed*, which was produced in Lowndes county.” It is found under the act approved February 1, 1879, prohibiting, in certain cases, the sale, exchange and transportation of cotton in Lowndes and other specified counties.—Acts 1878–9, p. 206.

There is also a count in the indictment specially averring that the case does not fall within the class of cases contained within the proviso, or exception to the statute. This, however, was unnecessary, being a mere matter of defense, which the prosecutor is not required to negative by way of anticipation. If the act charged as a violation of the statute comes within the influence of the *proviso*, this would constitute a defense more properly coming from the defendant.—1 Whart. Cr. Law, § 378; 1 Arch. Cr. Pl. 86; 1 Bish. Cr. Proc. § 513. This is the settled rule where a proviso or exception is embodied in a separate clause of the statute, and not in the same clause with that creating the offense.—*Clark v. State*, 19 Ala. 552; 1 Brick. Dig. p. 499, § 739. And such is this case.

It is insisted that the indictment is objectionable on the ground of uncertainty, in failing to aver the *person* from whom the cotton was purchased.

The general rule is, that when a new offense is created by statute, if the offense is described in the language of the statute, or words conveying the same meaning, this is deemed sufficient.—*Clark v. State*, 19 Ala. 552; Code, 1876, § 4792; 1 Bish. Cr. Proc. § 595; *Sparrenberger's case*, 53 Ala. 481. But it is not always sufficient to pursue the words of the statute, “unless by doing so you fully, directly and expressly allege the fact, in the doing or not doing of which the offense consists.”—*Turnipseed v. State*, 6 Ala. 664; *State v. Brown*, 4 Port. 413; 1 Bish. Cr. Proc. § 612; *Carter v. State*, 55 Ala. 181; *Quinn v. State*, 9 Amer. Rep. 754.

The objection urged goes to the degree of certainty or particularity with which the offense is stated. The statute requires that every indictment “must state *the facts constituting the offense*, in ordinary and concise language, without prolixity or repetition, in such manner as to enable a person of common understanding to *know what is intended*, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment; and in no case are the words ‘force and arms,’ or ‘contrary to the form of the statute,’ necessary.”—Code, 1875, § 4784. This does not differ essentially from the ingredients of an indictment suggested by Lord HALE,

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which, he said, should be “a plain, brief and certain narrative of an offense committed by any person, and of those *necessary circumstances that concur to ascertain the fact and its nature.*” 2 Hale, P. C. 169. The purpose of our legislation has been to sweep away those rigid and narrow rules of construction prevailing at the common law, which are known to have rendered, by reason of their technicality, the adoption of this liberal canon of Lord HALE impossible.—Roscoe’s Cr. Ev. *79–80. It is, however, a constitutional requirement that in all criminal prosecutions the accused has a right “to demand the nature and cause of the accusation [and] to have a copy thereof.” Const. 1875, Decl. Rights, Art. 1, § 7. This, as observed by Mr. Greenleaf, is “the dictate of natural justice as well as a doctrine of common law.”—3 Greenl. Ev. § 10. It is generally conceded that the chief purposes of this provision were, 1st, to *identify* the charge, lest the grand jury should find a bill for *one offense*, and the defendant be *tried for another*; 2d, to enable the defendant to *prepare for his defense* in particular cases; 3d, that the judgment may enure to his subsequent protection, and to this end enable him to plead former conviction or acquittal of the *same offense*. The force of this reason, however, is lessened by the general practice admitting extrinsic evidence to identify the charge, on the interposition of the pleas of *autrefois convict* or *acquit*. And 4th, to enable the court, after conviction, to pronounce judgment on the record.—1 Bish. Cr. Proc. §§ 507, 576; 1 Stark. Cr. Pl. 68; Clark’s Man. Cr. Law, §2175, *et seq*; 3 Greenl. Ev. § 10. It is conceded that the statute has, in many cases, dispensed with that particularity and certainty required at common law in the statement of offenses by indictment; and the liberal forms prescribed in our Code have generally been held not to infringe upon the intent and spirit of the above constitutional provision.—*Noles v. The State*, 24 Ala. 672; *Burdine v. The State*, 25 Ala. 60; *Smith v. The State*, 63 Ala. 55; *Block v. The State*, 66 Ala. 493. In *Smith’s case*, *supra*, it was said that “the only safe rule is to require that, when the indictment is *not framed on any form* given in the Code, it shall aver *every material constituent of the offense*; always excepting the statement of *venue and time.*”—Code, 1876, §§ 4787–8. But *time* must be averred when it constitutes a material ingredient of the offense.—Code, § 4788.

In cases where the statute makes it an indictable offense for any person to dispose of, or *sell* any particular kind of article, commodity, or merchandise, it has generally been held that the more judicious course is for the indictment to specify the *ven-dee*, or person to *whom* the sale is made; or else to aver that he is unknown. Such, for example, seems to be the uniform holding of the courts as to indictments for the illegal sale of lottery

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tickets, made in violation of statutes prohibiting such sales. Wharton's Precedents, 828, 844; *People v. Taylor*, 3 Denio, 99; *State v. Munger*, 15 Vt. 290; *State v. Stucky*, 2 Blackf. p. 289; *Commonwealth v. Thurlow*, 24 Pick. 374. So in the case of statutes prohibiting the retailing of liquors, where no form is prescribed by the legislature, as done in this State, the sounder view is that the indictment should state the *purchaser*, or allege that his name is unknown.—1 Bish. Cr. Proc. § 548; 3 Whart. Cr. Law, § 2443. Under the provisions of section 4352 of the Code, making it an offense for any person to make a fraudulent conveyance of his property, the form specified in the Code requires the statement of the name of the vendee, or party to whom the conveyance is made.—Code, 1876, p. 995; Form No. 36.

This class of cases, however, can not strictly be considered analogous to the one in hand. They all embrace the *sale* of property by a defendant, which is presumptively his own and not another's. An averment of *ownership* would, therefore, furnish no aid to identification, and hence the necessity of averring the *purchaser*, to obviate the objection of vagueness and uncertainty in the statement of the particular offense.

The present indictment is for an illegal *purchase* by the defendant of property belonging to another. It is more analogous to the crime of receiving stolen goods, an indictment for which, at common law, was not required to specify the *name of the thief*, from whom the defendant received the goods, although required to state *the owner* of such goods, or that his name was unknown. —Roscoe's Cr. Ev. 804; *Murphy v. State*, 6 Ala. 845; *Com. v. Slate*, 11 Gray, 60; *State v. Smith*, 37 Mo. 58; Arch. Cr. Pl. 256. So in *Clark v. The State*, 19 Ala. 552, which was an indictment for permitting a gaming table to be exhibited and carried on in a house occupied by the defendant, it was held unnecessary to allege the name of the person by whom the table was exhibited, or that his name was unknown.

In our judgment, the *ownership* of the cotton alleged to have been purchased by the defendant should have been averred, or else the *person from whom* the purchase was made should have been stated.

With respect to ownership, it was the settled rule of the common law that "the name of the owner of the property, in relation to which the offense is committed, should be truly stated in the indictment."—1 Stark. Cr. Pl. 182, 207; 1 Bish. Cr. Proc. § 583. Such seems also to be the statutory rule, and certainly the established practice as to crimes generally, involving injuries to property.—Code, 1876, §§ 4800, 4824, p. 992; Form 12, p. 995; Forms 33, 34, 37, *et seq.*; 1 Bish. Cr.

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Proc. §§ 569, 583; *Rex v. Patrick*, 1 Leach, 287. An averment of ownership, in our judgment, is just as essential to certainty in this case, as in that of receiving stolen goods, burglary, arson, or larceny. A just regard for the analogies of the law of pleading, in the absence from the Code of a special form, therefore, requires it; *or else* there should have been an averment of the name of the person from whom the commodity was purchased. *Either* would be sufficient to obviate any objection based upon a want of certainty in the statement of the offense charged in the indictment.—Code, § 4824; 1 Bish. Cr. Proc. §§ 581, 583; Code, 1876, p. 995, Form 36.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial. The prisoner will, in the meanwhile, be retained in custody until discharged by due course of law.

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Indictment for Trading in Farm Products between Sunset and Sunrise.

1. *Sufficiency of indictment; several offenses stated disjunctively in same count.*—It is no ground of objection to an indictment found under section 4369 of the Code of 1876, as amended (Pamph. Acts, 1878-9, p. 63), prohibiting the trading in designated farm products between sunset and sunrise, that the several offenses denounced by the statute are stated in the same count disjunctively, or in the alternative; being of the same character, and subject to the same punishment, they may be, under the express provisions of the Code (§ 4798), joined in the same count.

2. *Indictment for trading in farm products between sunset and sunrise; necessary averments of.*—An indictment under this statute, which charges that the defendant “did buy, sell, receive, barter, or dispose of” a designated quantity of seed cotton “after the hour of sunset and before the hour of sunrise of the next succeeding day against,” etc., is fatally defective in failing to aver the name of the person to whom the defendant sold, bartered or disposed of the cotton; and also in failing to aver the ownership of the cotton bought or received, or the name of the person from whom it was bought or received, or that the names of such persons were to the grand jury unknown.

3. *Instructions by principal to agent to buy farm products; presumption in reference to; act and declaration of agent as evidence against principal.* Where an agent is instructed to buy for his principal farm products, trading in which between sunset and sunrise is prohibited, the law presumes, in the absence of proof to the contrary, that the instructions were to buy at a time not prohibited by the statute; and hence, on the trial of the principal, indicted for the act of the agent in buying at a time covered by the statutory prohibition, the fact of the purchase, and the declaration of the agent at the time it was made, that he was buying for the

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principal, are not admissible against the defendant, "without bringing home to him the criminal design of the agent."

APPEAL from Barbour Circuit Court.

Tried before Hon. H. D. CLAYTON.

At the fall term, 1882, of said court the indictment in this case was returned by the grand jury, and at the same term the defendant was tried and convicted. The indictment is set out in the opinion.

The act relied on for a conviction was the sale of a stated amount of cotton in the seed, within the hours prohibited by the statute, to one Wiggins, who, as the evidence tended to show, purchased for the defendant, as his agent, and with his money. It was shown that the defendant was not present at the time of the purchase; and it is not shown that he had any knowledge that the purchase was made within the hours prohibited by the statute, or that he had instructed or authorized Wiggins to purchase cotton in the seed *within such hours*. The only agency which the evidence tended to show was merely an agency to purchase cotton in the seed. Exceptions were reserved by the defendant to the rulings of the Circuit Court in allowing the State to prove the fact of the purchase, a declaration made by Wiggins at the time of the purchase, that he was buying for the defendant, and acts and declarations of the defendant, which tended to show Wiggins' agency to purchase for the defendant cotton in the seed.

H. D. CLAYTON, JR., J. M. WHITE, A. H. THOMAS, and D. M. SEALS, for appellants, cited *Galbreath v. Cole*, 61 Ala. 142; *Patterson v. State*, 21 Ala. 571; *Seibert v. State*, 40 Ala. 60; *Nall v. State*, 34 Ala. 262; *Martin & Flinn v. State*, 28 Ala. 71; *Johnson v. State*, 29 Ala. 62; *Grattan v. State*, ante, p. 344

H. C. TOMPKINS, Attorney-General, for the State. (No brief came to the hands of the reporter.)

SOMERVILLE, J.—The indictment charges that the defendant "did buy, sell, receive, barter, or dispose of two hundred and ninety pounds of seed cotton, *after the hour of sunset and before the hour of sunrise* of the next succeeding day, against the peace and dignity of the State of Alabama." The offense charged is one violative of section 4369 of the Code, as amended by the act approved February 12, 1879.—Code, 1876, § 4369; Acts 1878–79, p. 63.

It is very clear that the indictment is bad for uncertainty. It is no objection, however, that the several offenses denounced by the statute are stated in the same count disjunctively, or in the alternative. They are of the same character, and subject to the

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same punishment, and may, therefore, be included in the same count, under the express provisions of the Code.—Code, § 4798; *Noble v. State*, 59 Ala. 73.

Under the authority of *Grattan's case*, ante, p. 344, we hold, that the indictment should have averred the name of the *vendee* of the cotton to whom the defendant *sold, bartered or disposed of it*; and it should have averred, either in the alternative in the same count, or in a different count, at the option of the grand jury, the *ownership* of the property *bought or received*, or else the name of the *person from whom* it was *bought or received*. Either of the latter averments is clearly sufficient, and both are not required. If these facts were unknown to the grand jury, it should have been so expressly stated. These averments were necessary to obviate the want of certainty in identifying the offense charged, and were exacted by a just regard for the analogies of the law of pleading, as well as of the forms prescribed by the Code for analogous cases.—*Grattan's case*, supra; Code, 1876, § 4824; Form 36, p. 995; Wharton's Prec. 828, 844; 1 Bish. Cr. Proc. §§ 548, 583; 3 Whart. Cr. L. § 2443; *Com. v. Slate*, 11 Gray, 60.

We are of opinion that the various exceptions taken to the admission of evidence should have been sustained. There is no evidence tending to show that George Wiggins *was the authorized agent of the defendant, Russell, to violate the law*. It may be true that Russell conferred on Wiggins authority to purchase cotton in the seed. But this was an act perfectly lawful in itself, and was not a crime unless perpetrated *at a time forbidden by law*—"after the hour of *sunset* and before the hour of *sunrise* of the next succeeding day."—Code, 1876, § 4369. Every agency is presumptively a lawful one. If an agent be instructed to do an act, he must execute his agency in a legal manner, if possible. He possesses no authority to perpetrate a crime in obeying the instructions of his principal. The law presumes, in the absence of proof to the contrary, that Russell's instructions to Wiggins to buy seed cotton, were to buy at a time of the day authorized by law, and not in the night time when it was unlawful. Hence, the declarations of Wiggins, at the time of the purchase, that he was acting as the agent of defendant, were inadmissible, without bringing home to him the criminal design of his agent. And under the same principle, the entire evidence, bearing on the purchase of the cotton made by Wiggins, which was without the authority of the defendant, should have been excluded from the jury. Whart. Cr. Ev. (8th Ed.) §§ 695-96; *Seibert v. State*, 40 Ala. 60; *Nall v. State*, 34 Ala. 262.

The judgment of the Circuit Court must be reversed, and the cause remanded for further proceedings.

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Indictment for Murder.

1. *Murder; conviction of murder in second degree an acquittal of murder in the first degree.*—A conviction of murder in the second degree is an acquittal of murder in the first degree; and, on appeal from the judgment of conviction in such case, this court will not consider the rulings of the primary court on questions relating to murder in the first degree, as, on a second trial, after reversal and remandment, all distinction between the degrees will be wholly immaterial.

2. *Same; failure of court to instruct the jury as to constituents of manslaughter; when free from error.*—On the trial of a defendant for murder, the failure of the primary court to instruct the jury as to the constituents of manslaughter in its general charge is not an error of which he can complain on appeal. If he deemed the instructions not full enough on any point, he should have asked specific instructions; and failing to do so, this court can not consider the question.

3. *Same.*—The failure of the primary court to so charge is free from error in this case for the additional reason, that the bill of exceptions purports to set out all the evidence, and contains no evidence tending to show that the offense, if any was committed, was, or could be manslaughter; the defendant being, under the evidence, either guilty of murder, or justifiable in the commission of the homicide under the law of self-defense.

4. *Homicide; self-defense.*—If a defendant indicted for murder did not provoke, or bring on the difficulty, but approached the deceased in an orderly and peaceful manner, and the deceased replied angrily and insultingly, advanced towards him, and placed his hand upon, or in the direction of his pistol pocket in such manner as to indicate to a reasonable mind that his purpose was to draw and fire, the defendant was authorized to anticipate him and fire first.

5. *Same.*—The rule in such case would not be varied, if it should turn out that the deceased was in fact unarmed, as the law of self-preservation did not require the defendant to wait until the weapon was presented, ready for deadly execution; but he had the right to act on the reasonable appearance of things. The danger, however, must have been real, or so manifestly apparent as to create a reasonable belief of present impending peril to life or limb; and the defendant must not have been instrumental in provoking or bringing it on.

6. *Same; when defendant not required to retreat.*—If the accused, with no intention of bringing on a difficulty, approached the deceased in a peaceable manner, and the deceased made the first hostile demonstration, by drawing, or attempting to draw a weapon, or by appearing to do so, the appearances coming within the rule declared above; and if the accused was in such proximity to the deceased as to render it hazardous to attempt flight; or if the assault was made with a deadly weapon, and was open and direct, and in perilous proximity; then the law would not require the accused to endanger his safety by attempted flight.

7. *When plea of self-defense is unavailing.*—But if the accused approached the deceased for the purpose of bringing on a difficulty with him, or had previously formed the design of taking his life, the plea of self-defense would be unavailing.

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8. *Malice presumed from use of deadly weapon; burden of proof.*—The law presumes malice from the use of a deadly weapon, and casts on the defendant the *onus* of repelling the presumption, unless the evidence which proves the killing also shows that it was done without malice; "in other words, the burden of proving that a homicide was committed in self-defense rests on the defendant, unless it can be deduced from the facts and circumstances which prove the killing."

9. *Same.*—But if the testimony which proves the homicide, proves also its excuse or justification, then the burden is not shifted, and the defendant need introduce no proof.

10. *Homicide; general character of deceased for violence; degrees in.* Where on the trial of a defendant indicted for murder a witness examined on his behalf had testified that he knew the general character of the deceased for peace, and that, outside of his friends, he was regarded as a turbulent and dangerous man, it is error for the court to require the defendant, on motion of the State, to incorporate in a question propounded by him to the witness touching the deceased's general character for violence, the words "blood-thirsty," "quarrelsome," "turbulent," "vengeful" and "dangerous." There are degrees in a quarrelsome or turbulent character; and, the proper predicate of knowledge being laid, the defendant should be free to ask such legal questions as he may elect to ask.

11. *Cross-examination of witness as to general character; what questions permissible.*—As character manifests itself by the manner in which one is esteemed, spoken of, or received in society, it is always permissible, on cross-examination of a witness testifying in reference thereto, to ascertain the extent of his information, the foundation of his opinion, or the *data* from which he draws his conclusion; and hence, on the trial of a defendant indicted for murder, in which the general character of the deceased for peace was an issue, it is error for the court to refuse to allow the defendant, on cross-examination of a witness examined by the State, who had testified that the deceased's general character for peace and quiet was good, to ask the witness whether he had not heard of certain enumerated acts of violence done by the deceased.

12. *Violent or blood-thirsty character of deceased; when material.*—When it is doubtful who was the aggressor, the known violent or blood-thirsty character of the deceased is a material matter to be considered by the jury, as more prompt and decisive measures of defense are justifiable against such an assailant. But this principle is confined to defensive measures; and it furnishes no excuse or palliation for aggressive action, nor when the difficulty is brought on, or sought by the accused.

13. *Confession; admissibility of.*—*Held*, under the facts shown by the evidence in this case, that a confession made by the defendant to an officer who had him in his custody, was voluntary and admissible.

14. *Self-defense; when previous threats by deceased may be considered in aid of.*—While previous threats do not make out the plea of self-defense, but there must be an actual or apparent present, impending peril to life or limb, either so menacing as to render any attempt to escape an increase of the peril, or such peril as can not reasonably be otherwise avoided, before life can be taken even by one who is without fault himself; yet, such threats, if proved, and known to the defendant, should be weighed by the jury, with other acts indicating hostility, in determining whether the fatal act was done under the reasonable and honest conviction, that its perpetration was then and there necessary to save the accused from the loss of his life, or from suffering great bodily harm.

APPEAL from Calhoun Circuit Court.

Tried before Hon. LEROY F. BOX.

John A. DeArman, the defendant in the court below, was indicted for the murder of Seaborn J. Crook, and was tried

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and convicted of murder in the second degree, and sentenced to the penitentiary for the term of twelve years. On the trial many witnesses were examined, both for the prosecution and the defendant, whose testimony is set out *in extenso* in the bill of exceptions. It was not controverted on the trial that on or about 16th August, 1881, early in the morning, the defendant killed the deceased, shooting him with a double-barrel shot-gun, the deceased being at the time on the porch of the Jacksonville Hotel, in the town of Jacksonville, in said county, and the defendant sitting on his horse, on or near the sidewalk, with his gun lying across the saddle in front of him. Nor does it seem to have been controverted, that just prior to the killing the deceased came out of the store of one Hammond, about twenty-five feet from the door of the hotel, having three breach-loading Springfield rifles, went directly to the hotel, entered the hall, the door being the entire width of the hall and open, and placed the rifles against the wall of the hall near the door; that while standing there, and about one or two minutes after he had so placed the rifles, the defendant rode up to the sidewalk immediately in front of the hall door, and spoke to the deceased. Nor does it appear to have been controverted that when the deceased came out of Hammond's store and started in the direction of the hotel, the defendant was sitting on his horse in front of a saloon, in sight of the store, and saw the deceased when he left the store, and when he entered the hotel. When the defendant rode up to the hotel he had "swung around him" a hunting horn, and was followed by two dogs. The deceased had on a long "duster" at the time he was killed, and it appears that he was marshal of the town of Jacksonville.

There is, however, a conflict in the evidence as to the circumstances immediately preceding and attending the killing—as to what was then said and done by both parties, and their demeanor towards each other. The evidence for the State tended to show that when the defendant rode up in front of the hotel, he addressed the deceased, who was standing near the door, where he had placed the rifles, with his back to the defendant, saying, "Seab, can you blow a horn"; or, as stated by another witness, "Can I," or "can you blow a horn"; that the deceased then looked back over his shoulder, not turning his body, and replied, "Yes"; that the defendant then "rode round on the sidewalk" and said, "Won't you go hunting with me to-day? You said you would yesterday"; that when this question was asked, the deceased turned, and faced defendant, and took one step towards him (or, as stated by another witness, "Crook walked out two or more steps towards defendant as they talked";) that as he stepped towards defendant he said, "No, judge, I can't go to-day"; and as soon as the deceased had

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said this the defendant shot him, he then being about two and a half or three feet from the muzzle of the defendant's gun when it fired; that at the time the gun fired, its position, in front of defendant, was not changed, except that the muzzle was slightly lowered; that the defendant cocked the gun after the conversation began; that at the time of the killing, and during the conversation, the deceased had only a stick in his hand, which he did not offer or attempt to use, one end of it being in his hand, and the other on the floor; that the defendant made no hostile demonstration whatever towards the defendant, and was not armed; and that both the deceased and the defendant "spoke mildly and pleasantly," and no change on the face of either of them was discerned prior to the shooting, indicating anger, or other bad feeling. The evidence for the State further tended to show that as the gun fired, the defendant was thrown from his horse, it having become frightened; that he immediately got up, came to the place where the dead body of the deceased was lying, and said: "I came to kill him, and," with an oath, "I've done it"; and that he then remounted his horse and rode off in the direction of his home. So far as disclosed by the record, the deceased and defendant had not met that morning prior to their meeting at the hotel.

The defendant read in evidence the deposition of one Coleman, whose testimony in regard to the killing was as follows: "I saw the shooting. Defendant was some distance from the hotel, and saw Crook going towards the hotel with three guns, and he said he would go and see him about the hunt they were talking about. As he approached Crook, he said: 'Are you going to take that hunt with me to-day?' Crook's reply was: 'No, by God, I am not.' Defendant then asked him if he could blow his horn for his dogs, and Crook said he could not, with some other words that I did not understand, at the same time running his hands in his pockets. I turned my head away, and heard the report of a gun, and I instantly looked back and saw defendant getting up—his horse having thrown him—and Crook lying dead. . . . Crook had a common sized stick in his hand, when the difficulty commenced, but I do not know in which hand he had it. . . . I am sure that defendant asked Crook for permission to blow his horn, and Crook answered in an ordinary tone of voice, but short, and had a stick in his hand, and was approaching defendant, and was in four or five feet of him when the gun fired. It was from thirty to sixty seconds from Crook's answer till the gun fired." The testimony of this witness as to the conversation between the defendant and deceased, just prior to the killing, is corroborated by the testimony of other witnesses exam-

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ined by the defendant. Another witness for the defendant testified, among other things, as follows: "When defendant rode up Crook advanced towards him. I heard each of them say something, but I could not understand what they said. When Crook advanced on defendant, his right hand was on his hip, and under his coat, and the gun fired almost immediately after he started." Another witness for the defendant testified, among other things, that about the time Crook had put the rifles against the wall in the hall of the hotel, "the defendant rode up and spoke to him. He said something about going hunting, and Crook answered, *no*. Defendant then said something about a horn, and as Crook answered him, he (Crook) advanced towards defendant, and threw his right hand behind him like he was going to get something, and then the gun fired and both fell." The defendant also examined one Brown as a witness who testified, in substance, among other things, that he saw the deceased about sunrise of the morning of the killing, and heard him say that he would kill defendant, if he came to town that day; and that shortly afterwards, and a few minutes before the killing, witness told defendant what the deceased had said, and "told him he had better look out." Testimony was also offered by the defendant tending to show that the deceased had a pistol in his pocket, and that he had his hand on it, when he was killed. It was not shown that the deceased made any effort to use any one of the rifles which he had carried to the hotel.

The State was allowed, against defendant's objection, to prove by one Lee, a deputy sheriff, a confession made to him by the defendant, upon, in substance, the following preliminary proof: When the defendant rode off in the direction of his home after killing Crook, several armed persons followed for the purpose of arresting him. Three of the number found him in a field near his house, about two miles from Jacksonville, with his gun, and drew their guns on him. About this time the witness Lee and others came up, and the defendant said to him: "You are an officer and a gentleman. Don't let these men hurt me." He was arrested by Lee without resistance, and carried back to Jacksonville, he and Lee riding in a buggy, with some of the crowd in the rear and some in front. After going a short distance the witness said to the defendant: "I am sorry you have got into trouble;" and thereupon the defendant made the confession which was as follows: "The defendant said he had done wrong; that he expected they would hang him or penitentiary him, and that he did not care a d—n which; that he did not intend to employ a lawyer; and that he had consulted his family about it *last night*, and it was all right." He also said in the same conversation that "Seab Crook [the

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deceased] had beat him up and broke two of his ribs, and that he was an old man." It was also shown that no threats or inducements were made against, or offered to the defendant before he made the confession. To the ruling of the court on the admissibility of the confession the defendant excepted.

The defendant also reserved exceptions to the refusal of the court to allow one of his witnesses to answer the following questions: (1) "State whether or not you saw Crook have defendant in custody on Monday evening before the killing;" (2) "Did you see Crook strike DeArman on that Monday evening;" (3) "Did you see Crook kick DeArman into the calaboose that evening;" (4) "Was there or not for many years a family feud between Crook's family" and that of the defendant. Numerous other exceptions were reserved by the defendant to the rulings of the court on questions of evidence. The facts touching those discussed by this court are sufficiently stated in the opinion.

Several exceptions were reserved by the defendant to parts of the general charge of the court; and among them were the following: 6. "If, under these rules, you find from the evidence that the homicide was not in self-defense, then evidence—if there be such—of threats previously made by Crook against the defendant, and evidence of Crook's bad character for peace and quiet can afford no palliation or extenuation of the offense." 7. In substance, that if the jury find that the killing was in self-defense, or if from the evidence they have a reasonable doubt as to whether or not the killing was in self-defense, they should look, in connection with the other evidence, to the evidence in relation to Crook's bad character as a dangerous, blood-thirsty, revengeful, overbearing, reckless man, or his general character for peace and good order, and to any evidence of threats previously made by Crook, in determining the real or apparent danger to DeArman, impending at the time of the killing, and the real or apparent necessity for slaying Crook, in order to save himself from death or grievous bodily harm. The general charge fails to instruct the jury as to the constituents of manslaughter.

The defendant also duly reserved exceptions to the rulings of the court in refusing to give four charges requested by him. The opinion only renders it necessary to set out the first of these charges, which is as follows: "The danger that will excuse one for killing another need not be real or actual. It may now be known that all the appearances of danger were false, and Crook never intended to do defendant any harm, and that he did not have a pistol; yet, if the jury believe from all the evidence in this case, that the appearances of danger surrounding the defendant at the time were such as to produce a reasonable

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belief in the mind of the defendant, that his life was in danger, or that he was about to suffer great bodily harm; and that there was no other reasonable means at the time open to the defendant to avoid the danger, but by taking Crook's life—the defendant being without fault at the time—the law holds him harmless, and the jury must acquit him, although Crook may have had no pistol.” The second charge requested by the defendant, and refused, also embodied instructions on the doctrine of self-defense.

At the request of the State, the court charged the jury, *inter alia*, as follows: 1. “When life is taken by the intentional use of a deadly weapon, the law presumes that the killing was malicious, unless the evidence establishing the killing also shows circumstances of justification, mitigation, or excuse, which overturn that presumption.” 4. “Where the question of self-defense arises from the evidence, the jury can not consider evidence of threats made against the defendant by the deceased prior to the killing.” 6. “When a defendant sets up self-defense in justification or excuse of a killing, the burden of proof is upon him to show to the jury by the evidence, that there was a present, impending danger, real or apparent, to life or limb, or of grievous bodily harm, from which there was no other probable means of escape; and the slayer must not have been the aggressor.” 8. “If the evidence fails to show that, at the time of the shooting, Crook made any hostile demonstration towards DeArman, then the jury can not consider any evidence of threats made by Crook against DeArman, or evidence of Crook's bad character.” To the giving of these charges the defendant separately excepted.

The rulings above noted are here, among others, assigned as error.

DENSON & DISQUE, and PARSONS & PARSONS, for the appellant. (1) Although the defendant was convicted of murder in the second degree, yet an erroneous charge upon murder in the first degree will operate a reversal. Error without injury does not apply in Alabama in cases of this magnitude. *Mitchell v. State*, 60 Ala. 28–35. (2) The court erred in refusing to give the first written charge of the defendant.—*Cross v. State*, 63 Ala. 40; *Jordan v. State*, 11 Tex. (Ct. of Ap.) 435. (3) The court erred in refusing to give the second charge asked by defendant.—*Bohannon v. State*, 8 Bush. 482; *State v. Kennedy*, 7 Nev. 374; *Foster v. State*, 11 Tex. (Ct. of Ap.) 105; *Jordan v. State*, *Id.* 435; *Kendall v. State*, 8 Tex. (Ct. of Ap.) 577; *Erwin v. State*, 23 Amer. Rep. 733; *Runyan v. State*, 26 Amer. Rep. 52; *Roscoe's Cr. Ev.* 767, *et seq.*; *Eiland v. State*, 52 Ala. 332. (4) The presumption of malice from the use of a deadly weapon is derived

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from the common law ; and hence, murder in the second degree in Alabama being murder at common law, the grade of murder that is presumed from the use of such weapon is murder in the second degree. The law never presumes a killing murder in the first degree ; but the presumption that is indulged from the act of killing is murder in the second degree.—*Willis v. Commonwealth*, 32 Gratt. 929 ; *Schlencker v. State*, 9 Neb. 303 ; *Previtt v. State*, 5 Neb. 377 ; *Milton v. State*, 6 Neb. 136 ; Cases on Self-Defence, 511 ; *State v. Evans*, 65 Mo. 574 ; *State v. Gassert*, 65 Mo. 352. (5) The court erred in not charging the law of manslaughter. There was sufficient evidence to authorize such a charge. This being true, it was then the imperative duty of the court to charge on the law of manslaughter. The court, in such case, has no right to assume there was malice ; this is peculiarly a question for the jury.—3 Wharton's *Crim. Law*, § 3163 ; *State v. Judge*, 58 Ala. 407 ; *State v. Banks*, 73 Mo. 592 ; *State v. Branstetter*, 65 Mo. 149 ; *Lane v. Commonwealth*, 59 Pa. St. 371. (6) There was manifest error in refusing to allow the defendant to ask the witnesses, Bush and others, examined by the State for the purpose of showing that the deceased had a good character for peace and quiet, on cross-examination, the several questions propounded to them, for the purpose of testing their knowledge of such character.—*Ingram v. State*, 67 Ala. 67 ; 1 Best on Ev. § 261 ; 22 Ala. 39. (7) The court erred in admitting the confession testified to by the witness Lee.—*Brister v. State*, 26 Ala. 107 ; *Aiken v. State*, 35 Ala. 399 ; *Young & Griffin v. State*, 68 Ala. 569. (8) The court erred in requiring the defendant to incorporate into the question propounded to Thomas Pelham, as to the character of the deceased for violence, the terms "quarrelsome," "revengeful," "turbulent," and "dangerous." A man may be of bad character for peace and quiet, generally known to be so ; and yet, he may not be generally known as a revengeful, quarrelsome, turbulent, and dangerous man. (9) Other points raised by the record, but not passed on by this court, discussed.

H. C. TOMPKINS, Attorney-General for the State. (No brief came to the hands of the reporter.)

STONE, J.—The defendant was indicted for murder, and convicted of murder in the second degree. This was an acquittal of murder in the first degree, and the prisoner can not again be tried for that highest grade of felonious homicide. In *Mitchell v. State*, 60 Ala. 26, we defined the constituents of murder in the first degree, and drew the distinction between that and murder in the second degree. We adhere to what we there said, and will not repeat it. We will not consider any

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questions raised by this record, relating to murder in the first degree. In any future trial of this case, all distinction between murder in the first degree and murder in the second degree will be wholly immaterial and irrelevant. If the defendant is guilty of murder at common law, as declared in our rulings thereon, and if it is proven with that measure of proof the law exacts in criminal cases, then the jury should find him guilty of murder in the second degree, for they can go no higher. In such finding, they must fix the duration of imprisonment in the penitentiary, not less than ten years.

It is objected in behalf of the accused, that the Circuit Court should have instructed the jury as to the constituents of manslaughter, and that the failure to do so is an error of which appellant can complain. There are two answers to this: First, if the accused deemed the instructions not full enough on any point, he should have asked specific instructions; and failing to do so, we can not consider the question; second, the bill of exceptions purports to set out all the evidence, and we fail to discover any testimony tending to show the offense, if any was committed, was, or could be, manslaughter. The defendant was either guilty of murder, or he slew the deceased in self-defense. One phase of the testimony tends to prove a most causeless murder. If the jury are convinced beyond all reasonable doubt, that this version is the true one, then the defendant should be pronounced guilty of murder. On the other hand, there is other testimony tending to show that the first hostile demonstration was made by the deceased. If the jury believe the defendant did not provoke, or bring on the difficulty; that he approached the piazza, on which deceased was standing, in an orderly and peaceful manner; that deceased replied to him angrily or insultingly, advanced towards him, and placed his hand upon, or in the direction of his pistol-pocket, in such manner as to indicate to a reasonable mind that his purpose was to draw and fire; then the defendant was authorized to anticipate him, and fire first; and the rule would not be varied, if it should turn out the deceased was in fact unarmed. The rule of self-defense in such cases is, that persons may and must act on the reasonable appearance of things; for the law of self-preservation would be very incomplete, if persons thus menaced were required to wait until the weapon was presented, ready for deadly execution. The danger, however, must be real, or so manifestly apparent, as to create a reasonable belief of present impending peril to life or limb; and the accused must not have been instrumental in provoking or bringing it on.—*Ingram v. State*, 67 Ala. 67; *Leonard v. State*, 66 Ala. 461; *Cross v. State*, 63 Ala. 40. So, if the accused approached the deceased for the purpose of bringing on a difficulty with him, or had previously

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formed the design of taking his life, then the plea of self-defense is unavailing. If the accused, with no intention of bringing on a difficulty, approached the deceased in a peaceable manner, and the deceased made the first hostile demonstration, by drawing, or attempting to draw a weapon, or by appearing to do so, under the rules declared above; and if the accused was in such proximity to the deceased as to render it hazardous to attempt flight; or if the assault was with a deadly weapon, and was open and direct, and in perilous proximity, then the law would not require the accused to endanger his safety by attempted flight.—*Storey v. State*, ante p. 329. The law is a reasonable master, and has equal regard for every human life under its jurisdiction. It recognizes love of life as a natural and legitimate sentiment; and while it can not be moulded or controlled by notions of chivalry, it permits every one who is without fault, and who has adopted every reasonably safe expedient to avert the necessity, to take the life of his assailant, rather than to lose his own. The Divine law does not require us to love our neighbor better than ourselves.

In *Hadley v. State*, 55 Ala. 31, we said: "The law presumes malice from the use of a deadly weapon, and casts on the defendant the *onus* of repelling the presumption, unless the evidence which proves the killing shows also that it was done without malice." In other words, the burden of proving that a homicide was committed in self-defense rests on the defendant, unless it can be deduced from the facts and circumstances which prove the killing. We adhere to that doctrine.

Thomas Pelham testified for defendant that the deceased, Crook, outside of his friends, was regarded as a turbulent and dangerous man. He had testified he knew Crook's general character for peace. The court thereupon, on motion of the prosecution, "required the defendant to incorporate in the question as to Crook's character the words "blood-thirsty," "quarrelsome," "turbulent," "revengeful," and "dangerous." We are not sure we understand this exception. If the court instructed the counsel that he could not interrogate the witness as to Crook's character for violence, unless he asked him whether or not he had the character of being "blood-thirsty, quarrelsome, turbulent, revengeful and dangerous," then the rule was too exacting. A man may have a bad character for peacefulness, without possessing all the vicious qualities enumerated. There are degrees in a quarrelsome, or turbulent character, and, the proper predicate of knowledge being laid, counsel should be free to ask such legal questions as he may elect to ask.

W. F. Bush and others, rebutting witnesses for the State, had testified that Crook's character for peace and quiet was good. They were then asked whether they had not heard of

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several enumerated acts of violence done by Crook. The witnesses were not allowed to answer these questions. In this the Circuit Court erred. Character, in this connection, is the estimate which the public places on the person, the subject of the inquiry; his reputation. When a witness is called to testify in regard to it, he must not speak of or from his individual knowledge of the acts or conduct of the person inquired about. His reputation or standing, whether good or bad, is the matter to be deposed to. Character is the estimation in which one is held by the public who know his standing. Thus, one may have the reputation of being peaceable or quarrelsome, harmless or dangerous and blood-thirsty, truthful or the contrary, honest or dishonest. A witness, having knowledge of this estimate in which such person is held by the public, may testify as to his reputation or character, although he may have no personal knowledge that he is peaceable, truthful, honest, or the contrary. On cross-examination a witness as to character may be interrogated as to the foundation of his opinion. And, as character manifests itself by the manner in which one is esteemed, spoken of, or received in society, it is always permissible, on cross-examination, to ascertain the extent of the witness' information, and the data from which he draws his conclusion. The weight of such testimony must depend largely on the reasonableness of the conclusion the witness draws from the premises as he may depose to them.—*Ingram v. State*, 67 Ala. 67.

As we have heretofore said, there was some testimony tending to show that immediately preceding the killing Crook made a hostile demonstration by moving towards the defendant, and moving his right hand towards his hip pocket. If the movement forward indicated a hostile purpose, and if the jury believe, as fact, that Crook did first make a movement as if to draw a pistol, or if the testimony generates a reasonable doubt whether or not Crook first made such movement as if to draw, then the defendant should not be convicted of murder, unless they find he had previously made up his mind to take Crook's life, or that he sought or provoked the altercation. Previously formed design on defendant's part, or any step taken to bring on the difficulty, if found to exist, will deny to him the right to the plea of self-defense. In this connection, the testimony offered to prove the violent or dangerous character of the deceased, if believed, should be considered. On all doubtful questions as to who was the aggressor, the violent or blood-thirsty character of the deceased, if such be his character, enters into the account. More prompt and decisive measures of defense are justified, when the assailant is of known violent and blood-thirsty nature. But this principle is confined to defensive measures. It furnishes no excuse or palliation for aggressive

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action, nor when the difficulty is brought on, or sought by the accused. The principles we have just announced have reference to the clauses of the general charge, which are made the 6th and 7th exceptions of the defendant. They should be modified according to these views. Let us not be misunderstood. If the accused had the previously formed design to take Crook's life, and carried it into effect pursuant thereto, or if he provoked the difficulty, then Crook's character for violence, no matter how clearly proved, will avail him nothing.

In what we have said, we have declared the law in reference to both phases of the testimony. This it is the duty of the court to do, no matter what he may conceive to be the relative weight of the testimony on the opposing sides. With that he has nothing to do. The jury alone pronounce on the weight of testimony, and under their solemn oaths render their verdict, according to their findings of fact, and the law as declared to them by the court.

We decline to consider the exception numbered 1 to the general charge, but leave that question open, as no inquiry of murder in the first degree will arise on another trial. It affirms that murder, intentionally committed pursuant to a form design to take life, is the equivalent of a willful, deliberate, malicious and premeditated killing, and falls within the first degree. We are not prepared to say this is error, but we need not decide it. See *Mitchell v. State, supra*. It would clearly be murder, and we do not understand that to be controverted. That is enough for this case.

We do not think the Circuit Court erred in admitting the confessions testified to have been made to E. G. Lee, while he was returning with the prisoner to Jacksonville after the arrest. No threats, promises, or hostile demonstration was made, at all calculated to induce the confessions, made as they were testified to have been. The prisoner evidently looked upon Lee, who had him in custody, as his protector, and we fail to discover in the circumstances any evidence of threats made, or inducements held out, which could, in the slightest degree, induce the confession alleged to have been made. According to the evidence, the confession was voluntary.

The first charge asked by defendant asserts a correct proposition of law, and should have been given. The second charge asked contains, as one of its postulates, that "Crook advanced in the direction of the defendant with a gun or guns." The testimony tends to show the guns were standing in the hall of the hotel, and there is no testimony that Crook then had a gun or guns. This charge was rightly refused for this reason, if for no other.—*Tyree v. Lyon*, 67 Ala. 1; 1 Brick. Dig. 338, § 41.

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Defendant's charges 3 and 4 relate to murder in the first degree, and need not be considered.

The 4th charge given at the instance of the State was misleading, and should not have been given. True, previous threats do not make out the plea of self-defense. There must be an actual or apparent present, impending peril to life or limb, either so menacing as to render any attempt at escape but an increase of the peril, or such peril as can not reasonably be otherwise avoided, before life can be taken, even by one who is without fault in the premises. But previous threats, if proved, and known to the actor, should be weighed by the jury, in determining whether the accused acted under the reasonable conviction of present, imminent peril. Of themselves, threats previously made are insufficient; but they should be weighed with other acts indicating hostility, in determining whether the fatal act was done under the reasonable and honest conviction that its perpetration was, then and there, necessary to save the accused from the loss of his life, or from suffering grievous bodily harm. But this doctrine must be taken with what is said above. If the accused sought or provoked the difficulty, or if he availed himself of it as a pretext for executing a design previously formed to commit the homicide, then this would not be self-defense, but murder. The 8th charge given declares the correct rule as to when previous threats are to exert no influence with the jury.

The 6th charge given omits one qualifying clause. True, self-defense, as a rule, must be proved by the defendant. In other words, the *onus* is on him to make it good. But the rule has an exception. If the testimony which proves the homicide, proves also its excuse or justification, then the burden is not shifted, and the defendant need introduce no proof.

There are many exceptions in this case, and every step in the contest seems to have been severely combatted. We have found no errors, save those above pointed out.

Reversed and remanded. Let the accused remain in custody, until discharged by due course of law.

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Application by Attorney-General for Mandamus to compel the Circuit Court to re-instate Criminal Cause on Docket.

1. Removal of causes from State to Federal courts; Section 641 of U.

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S. Revised Statutes construed.—Section 641 of the Revised Statutes of the United States, providing for the removal into the Federal courts of civil suits or criminal prosecutions commenced in a State court against any person who is denied, or can not enforce therein any right secured to him by any law providing for the equal civil rights of citizens of the United States, etc., was intended only to afford protection against an infringement of the equal rights of citizens of the United States by State action, and by that action alone; and does not refer “to other obstructions of right, such as personal or class prejudice, or political feeling and the like.”

2. *Same.*—Hence, the existence, in the locality in which an indictment for crime may be found against a colored person, of a sentiment and prejudice hostile to him because of his race and color, is not a cause, under that statute, for the removal of the indictment for trial from the State to the Federal court.

3. *Same; jurisdiction of State court not ousted by the mere filing of an application for removal.*—The jurisdiction of the State court is not ousted by a mere application for the removal of a cause, civil or criminal, pending therein, to a Federal court; but it is only when the application is in proper form, conforms to the act of Congress authorizing the removal, and states facts bringing the case within the provisions of the act, that it becomes the duty of the State court to yield obedience to the paramount law, and to cease the exercise of its original jurisdiction.

4. *Same; jurisdiction of State court to pass on application for removal.* The State court, in such case, has an unquestioned jurisdiction to determine, upon the application for the removal, whether a case was thereby presented which required that it should cease jurisdiction and transmit the cause to the Federal court for final trial; but its determination of that question is subject to the jurisdiction and judgment of the Federal court, when the case finds its way into that court.

5. *Same; jurisdiction of Federal court to pass on question of removal; effect of its determination.*—When the case has been, by the order of the State court, transmitted to the Federal court, upon that court devolves the duty of determining its own jurisdiction. In determining this question, it is not concluded or affected by the judgment of the State court having original jurisdiction; and the conclusion of the Federal court, that the application does not give it jurisdiction, and its judgment remanding the cause to the State court, is binding upon the latter court.

6. *Same; condition of cause on remandment by the Federal to the State court.*—In such case, the Federal court not having acquired, the State court could not lose, jurisdiction by the erroneous order of removal; and hence, when the cause is remanded to the State court, it is in the same plight and condition as it was in, when the order of removal was entered.

7. *When erroneous order of removal of a prosecution pending in a State court to Federal court does not operate a discontinuance.*—Where a State court, on the application of a defendant in a criminal case pending therein, founded on Section 641 of the U. S. Rev. Statutes, erroneously entered an order removing the cause to the Federal court, and afterwards that court declined to take jurisdiction, and remanded the cause to the State court, the failure of the latter court to proceed in the prosecution, or to enter continuances or other orders in the cause, while it was awaiting disposition in the Federal court, and until that court made the order of remandment, does not work a discontinuance.

Application to this court by the Attorney-General for *Mandamus* to the Circuit Court of Lawrence county, to compel the vacation of an order striking a criminal cause from the docket, and its restoration thereon for trial.

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The facts are sufficiently stated in the opinion.

H. C. TOMPKINS, Attorney-General, for the State.

W. COOPER, and W. P. CHITWOOD, *contra*.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The facts shown by the transcripts of records accompanying the motion are, that at the fall term, 1874, of the Circuit Court of Lawrence county, one William Richardson was indicted for an assault with intent to murder. At the fall term, 1875, he presented a verified petition, stating that he was a man of color, and, because of a hostile public sentiment and prejudice, he could not in that court obtain justice and the equal protection of the laws; wherefore he prayed that the cause be removed for trial to the Circuit Court of the United States, sitting at Huntsville, for the Northern District of Alabama. Thereupon an order was entered, removing and transferring the cause to the Federal Court. In that court, at the April term, 1876, a judgment was entered, reciting that the petitioner appeared by his counsel, and no prosecutor appearing, came a jury who returned a verdict in favor of the defendant (the petitioner), and adjudging that he go hence without day. On a subsequent day of the same term, an order was entered recalling and vacating this judgment as having been improvidently entered, and untrue in its recitals, and re-instating the cause on the docket. The cause was from term to term thereafter continued, the defendant appearing, until the fall term, 1880, when an order was entered, remanding the cause to the Circuit Court of the county of Lawrence. In that court, subsequent to the order of removal, entered at the fall term, 1875, there were no orders or proceedings in the cause until the order of remandment was made, when, at the spring term, 1881, there was an order of continuance, and at the fall term, 1881, the defendant not appearing, a judgment *nisi* was entered on his recognizance against him and his bail. At the fall term, 1882, the defendant appeared and moved that the cause be stricken from the docket, because of the order of removal and the proceedings had in the Federal Court. The motion was granted, and the cause was stricken from the docket. The Attorney-General, on behalf of the State, now moves for a *mandamus*, to compel the vacation of the order striking the cause from the docket of the Circuit Court, and its restoration for trial.

It is declared by section 641 of the Revised Statutes of the United States, that civil suits or criminal prosecutions com-

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menced in any State court against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State where such suit is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, may, upon the petition of such person, filed in the State Court, at any time before the trial, or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next Circuit Court of the United States to be held in the district where it is pending, etc. Upon the filing of such petition, it is declared, all further proceedings shall cease, and shall not be resumed except as is provided for in the statute. The first material inquiry now presented is, whether the application filed in the Circuit Court disclosed a case or a state of facts authorizing a removal of the prosecution, arresting the jurisdiction of that court, and transferring jurisdiction to the Circuit Court of the United States. And that inquiry resolves itself into the question, whether the existence, in the locality in which an indictment for crime may be found against a colored person, of a sentiment and prejudice hostile to him because of his race and color, the laws of the State securing to him full protection of all his rights, and the State through none of its agencies denying to him equal protection under the laws, is a cause for removal of the indictment for trial from the State to the Federal court. The question is settled negatively. The statute was intended only to afford protection against an infringement of the equal rights of citizens of the United States by State action, and by that action alone. It does not refer "to other obstructions of right, such as personal or class prejudice, or political feeling and the like." *State v. Gaines*, 2 Woods, 342; *Virginia v. Rives*, 100 U. S. 313; *Thomas v. State*, 58 Ala. 365.

The petition not disclosing a cause for the removal of the prosecution to the Federal court, the order of removal was erroneous. And if subsequently the order had been recalled as improvident, and the court had proceeded as if it had not been made, it may be that its proceedings would not have been pronounced void. The jurisdiction of the State court is not ousted by a mere application for the removal of a civil cause, or of a criminal prosecution to a Federal court. It is only when the application is in proper form, conforms to the act of Congress authorizing the removal, stating facts bringing the case within the provisions of the act, that it becomes the duty of the State court to yield obedience to the paramount law, and to cease the exercise of its original jurisdiction. It may err either in determining that the application presents a case in which it ought, or ought not to cease its original jurisdiction; the determination is subject to

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the jurisdiction and sentence of the Federal court, when the case finds its way into that court. The Federal court must determine its own jurisdiction, and whatever it may determine is the law of the court of the State. The Circuit Court of the State had unquestioned jurisdiction of the indictment found by its own grand jury, a constituent element of the court, and had as unquestioned jurisdiction to determine upon the application of the accused, whether a case was presented which required that it should cease jurisdiction and transmit the cause for final trial to the Federal court. An error of judgment the court could commit in refusing, or in granting the application; the error was capable of correction. The prosecution having been by the order of removal transmitted to the Federal court, upon that court devolved the duty of determining its own jurisdiction. It was not concluded or affected by the sentence of the State court having original jurisdiction. The court by its order of remandment having determined that it had not jurisdiction, and that order remaining unreversed, and, not having been reversed, being unimpeachable, when the cause reached the State court again, it was in the same plight and condition in which it was when the erroneous order of removal was entered. The removal to the Federal court not being authorized by law, the case not being of the class in which by removal that court could acquire jurisdiction, the only order or judgment it could pronounce, which is of legal validity, was the order or judgment of remandment. The Federal court not acquiring, the State court could not lose jurisdiction.—*Akerly v. Villas*, 24 Wis. 165; 1 Amer. Rep. 166.

The failure of the State court to proceed in the prosecution while it was awaiting disposition in the Federal court, and until that court made the order of remandment, did not work a discontinuance. A discontinuance at common law was defined as a gap or chasm in the proceedings occurring after suit brought. It was a failure to continue the cause regularly from term to term, and if there were any lapses, or want of continuances, the parties were out of court. The plaintiff having left a gap or chasm in the proceedings, the defendant was not under the duty of further attendance upon the court. In its strictness it never obtained in our practice, and is inconsistent with the practice of continuing causes by a general order, and with the presumption of continuances, though not entered until the record shows the cause has been disposed of otherwise. There must here be some positive action by the plaintiff, by which a cause is taken from, and remains off the docket of the court, to work a discontinuance.—*Drinkard v. The State*, 20 Ala. 9; *Ex parte Remson*. 31 Ala. 270. The order of removal being improvident, though the cause was not regularly continued on

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the docket of the State court, a discontinuance was not produced. The case could not be lost in its passage between the two courts.—*Germania Fire Ins. Co. v. Francis*, 52 Miss. 457. Upon the case as now presented, we are of opinion the order of removal made by the Circuit Court of the State was erroneous and improvident; its only effect was the declination of the court for the time to proceed further; and when the error of the order was ascertained and declared by the sentence of the Federal court remanding the cause, it was the duty of the State court to receive jurisdiction, and proceed as if the erroneous order had not been made. In the case last cited, it is said: "An order for removal in a cause not embraced by act of Congress is void, and has no effect in legal contemplation, and although its practical effect may be an interruption, improperly, of the prosecution of the cause in the State court, the cause is to be considered as having been all the time pending in the State court, which delayed to see if the United States court would take jurisdiction, and, finding it would not, proceeds to try the case thus remitted to it as though no interruption had occurred."

The Circuit Court erred in striking the cause from the docket, and a rule *nisi* must issue directed to the judge presiding, requiring him to show cause why a peremptory *mandamus* should not issue.

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Indictment for Sale of Spirituous, Vinous or Malt Liquors contrary to Local Statute.

1. *Contract of sale of specific chattels; when complete.*—A sale of specific chattels in the possession of the seller is complete, and the title passes to the purchaser, when the parties agree upon the terms of sale, although the actual possession may not pass, and the purchaser may not be entitled to it, until he pays the price, or performs some other like stipulation.

2. *Same; delivery to common carrier.*—A delivery of goods to a carrier for the buyer, in accordance with his specific request, is a delivery to the buyer.

3. *Same; relation of the common carrier to the parties.*—When goods are forwarded through an express company, by instructions of the purchaser, marked "C. O. D.," the carrier is the agent of the purchaser to receive the goods from the seller, and the agent of the seller to collect the price from the purchaser; and the sale is complete when the goods are delivered to the carrier.

4. *Local statute prohibiting sale of intoxicating liquors; when sale not violative of.*—A sale, to be in violation of a local statute, making it unlawful "to sell, etc., spirituous, vinous, or malt liquors," within a desig-

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nated locality, must be made in that locality; and hence, a sale, passing the title, made in a different locality, where the liquor is set apart and delivered to an express company, to be by it transported into the territory covered by the statute, and there delivered to the buyer, is not within the words or spirit of the statute, although the liquor is sent "C. O. D.," by instructions of the buyer, and he pays the price therefor on delivery.

APPEAL from Shelby Circuit Court.

Tried before Hon. SAMUEL H. SPROTT.

The facts are sufficiently stated in the opinion.

COBB, WILSON & WILSON, and BOWDEN & KNOX, for appellant. (No brief came to the hands of the reporter.)

II. C. TOMPKINS, Attorney-General, for the State. The title to the liquor sold never passed out of Pilgreen until its delivery, at Columbiana, to the consignee. The expressman was the agent of defendant for the delivery of the liquor and collection of the price. If any damage had been done to it, or if it had been lost in the possession of the carrier, Pilgreen alone could have maintained an action for such loss or injury.—Hutchinson on Carriers, §§ 389-94.

BRICKELL, C. J.—The indictment was found, and the conviction had, under a special statute, rendering it unlawful "to sell, give away, or otherwise dispose of any spirituous, vinous, or malt liquors, or intoxicating bitters within five miles of the Methodist, Baptist, or Presbyterian churches of Columbiana," and in other designated localities.—Pamph. Acts, 1880-81, p. 148. The facts of the case were undisputed, and were agreed upon by the solicitor representing the State, and by the defendant and his counsel. The defendant was a licensed wholesale and retail dealer in spirituous, vinous and malt liquors, engaged in and doing business at Calera, a town in Shelby county, twelve miles from the town of Columbiana, the county site. He received by mail an order from one Dollar, requesting that he would send to him at Columbiana a half-gallon of whiskey, by the Southern Express Company, a common carrier between Columbiana and Calera, marked C. O. D. These letters imported that it was the duty of the express company to receive the price on delivery of the whiskey. The defendant filled the order at Calera, there delivered the whiskey to the express company, and by the company it was delivered to Dollar at Columbiana, where he paid the price and all charges to the company, from whom the defendant received the price at Calera. Instructions were given and refused; these we do not consider separately or critically. The case was really before the Circuit Court as if the jury had made a special finding of these facts, leaving

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the court to render judgment upon them. The effect of the instructions given was, that Columbiana was the place of sale, and that it was a violation of the statute.

These instructions proceeded probably on the hypothesis, that the sale was not complete, until there was a delivery of the whiskey at Columbiana, and the price there paid by the purchaser to the express company. A sale is defined by Mr. Benjamin, as "a transfer of the absolute or general property in a thing for a price in money." In *Falls v. Gaither*, 9 Port. 605, this court adopted the definition, or rather description of the contract as given by Ch. KENT: "A transfer of chattels from one person to another for a valuable consideration, and three things are requisite, viz: The thing sold, which is the object of the contract; the price, and the consent of the contracting parties." Upon all sales of specific goods in the possession of the vendor, the contract is complete when the buyer and seller agree; the property in the goods then passes to the buyer, and the risk of loss by accident, or from any other cause than the fault or negligence of the seller, is cast upon the buyer as an incident of ownership, though actual possession may not pass, and he may not be entitled to it until he pays the price, or performs some other like stipulation.—1 Parsons on Contracts (6th Ed.), 525. An illustration given in some of the books is, "if a man sells his horse for money, though he may keep him until he is paid, yet the property of the horse is in the bargainor or buyer." When buyer and seller are distant from each other, the delivery of the goods to a carrier by the seller, in accordance with the specific request of the purchaser, is a delivery to the purchaser.—1 Parsons on Contracts (6th Ed.), 532; Benjamin on Sales (3rd Am. Ed.), § 181. Applying these settled rules of the law of sales of personal property to the facts, the transaction can not be located at Columbiana. All the dealings between buyer and seller were at Calera. There the offer of the buyer was received, accepted and acted upon, and there every act was done, which it was intended the seller should do. The general property in the thing sold there passed to the buyer, by the delivery to the carrier of his own appointment, though he could not entitle himself to possession until he paid the price to the carrier. The carrier was his agent to receive the thing sold at Calera, and was the agent of the seller to receive the price. It would have been a neglect of duty, as a collecting agent, rendering the express company liable to the seller, if there had been a delivery of the whiskey without payment of the price; and if possession had been wrongfully obtained, it may be, the seller could have reclaimed it. The general property however passed to the buyer by the delivery to the express company at

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Calera; the risk of loss then passed to him; though there may have remained in the seller a special property, and though the buyer could not, without payment of the price, entitle himself to the absolute property and to the actual possession. "In law," as is observed by Mr. Benjamin, "a thing may in some cases be said to have in a certain sense two owners, one of whom has the general, and the other a special property in it." Benjamin on Sales, § 1. And this occurs in sales of personal property, when the bargain is struck, and the payment of the price is intended to be simultaneous with the delivery of possession. The seller has a lien on the property for the price, and the right of possession until it is paid. A sale, which will be in violation of the statute under which the conviction was had, must, within the designated locality, pass the title; a sale made in a different locality, where the liquor is set apart and delivered to the purchaser, or to a carrier for him, passing title, is not within its words or spirit.—*Garbracht v. Commonwealth*, 96 Penn. St. 449; S. C. 42 Am. Rep. 550.

The instructions given the jury by the Circuit Court were erroneous. The instruction ought to have been, that the admitted facts did not show the guilt of the defendant. Let the judgment be reversed and the cause remanded. The appellant will remain in custody, until discharged by due course of law.

Ex parte The State of Alabama, in re Henry Merlet.

Application for Prohibition to vacate and set aside Order of Judge of Probate releasing, on Writ of Habeas Corpus, Defendant convicted of Misdemeanor in County Court of Cullman County.

1. *Habeas corpus; when not appropriate remedy.*—*Habeas corpus* is an appropriate and legal remedy for the release of a prisoner who is restrained of his liberty by virtue of process issued under the order or judgment of a court, only in cases in which there is a want, or excess of jurisdiction in the court, under the order or judgment of which the process issued; and hence, where the court had jurisdiction both of the subject-matter, and of the prisoner's person, he can not be discharged on *habeas corpus*.

2. *Express power or jurisdiction; what powers it carries with it by implication.*—When a power or jurisdiction is expressly conferred by statute, everything necessary to make it effectual is also conferred by implication.

3. *County court of Cullman county; what jurisdiction and powers con-*

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ferred by act establishing.—The act entitled “An act to establish an Inferior Court for Cullman county,” approved March 1st, 1881 (Pamph. Acts, 1880–81, p. 211), providing that “said court shall have original jurisdiction, concurrent with the circuit court, of all misdemeanors committed in Cullman county,” but not prescribing the modes of procedure by which such criminal jurisdiction shall be exercised, nor conferring on the court the power to organize grand juries, nor authorizing the transfer to it for trial of indictments pending in the circuit court, must be construed so as carry with the express grant of jurisdiction thereby conferred, by necessary implication, the use of all process and modes of procedure, authorized by law, and applicable to county courts under the general statutes, in the exercise of similar jurisdiction by them.

APPLICATION to this Court by the Attorney-General for “a writ of *certiorari*, prohibition, or other proper writ,” to be directed to Hon. A. B. HAYS, Judge of Probate of Cullman county, commanding him to show cause, if any there be, why a certain order made by him, discharging one Henry Merlet from custody, on the hearing of an application by said Merlet before him for a writ of *habeas corpus*.

The facts are sufficiently stated in the opinion.

H. C. TOMPKINS, Attorney-General, and W. T. L. COFER, for the State.

H. L. WATLINGTON and GEO. H. PARKER, *contra*.

SOMERVILLE, J.—The only question presented by the record is, whether the county court of Cullman county had jurisdiction of the person of Henry Merlet, who was tried before that tribunal and convicted of a misdemeanor on March 8th, 1883, and was afterwards sentenced to hard labor for the county in default of securing the fine and costs. On petition for a writ of *habeas corpus*, heard before the probate judge of Cullman county, he was discharged from imprisonment, on the ground that the court, which tried and sentenced him, possessed no such jurisdiction, and its entire proceedings were, therefore, *coram non judice* and void.

The county court of Cullman county was established by an act of the General Assembly, approved March 1, 1881, entitled “An act to establish an Inferior Court for Cullman county.”—Acts 1880–81, pp. 211–214. Its judge was authorized to be appointed by the Governor, and to hold his office for three years from the date of his commission. It was provided further that “said court shall have *original jurisdiction, concurrent with the circuit courts, of all misdemeanors committed in Cullman county.*”—pp. 211–12, § 2. The act nowhere *expressly* declares that the mode of procedure, and methods of prosecution, applicable to ordinary county courts under the general law, shall apply to this court. The prosecution against

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Merlet was commenced by warrant of arrest, based on an affidavit of the prosecutor, and issued in accordance with the requirements of section 4702 of the Code, regulating the practice of county courts. It is not contended that this system of procedure is not expressly authorized by the constitution of the State, which empowers the General Assembly to dispense with a grand jury in all cases of misdemeanor, and to authorize prosecutions and proceedings by information in such cases before justices of the peace, and other courts of inferior jurisdiction established by law.—Const. 1875, Art. I, § 9. The argument is, that the General Assembly has not dispensed with prosecutions by a grand jury in cases of misdemeanor authorized to be tried before this new court, by which Merlet was tried and convicted.

We are of opinion that the county court of Cullman county had jurisdiction of both the *subject-matter* and the defendant's *person*, and for this reason the judge of probate had no authority to discharge the petitioner, Merlet, in the *habeas corpus* proceeding. It is a plain principle, frequently declared, that there must be either a total want, or else an excess of jurisdiction, in order that the writ of *habeas corpus* may be adjudged to be as an appropriate and legal remedy for the release of the prisoner who claims to be unlawfully restrained of his liberty. *Ex parte John Hardy*, 68 Ala. 303; *Freeman on Judg.* § 623; *Ex parte Simmons*, 62 Ala. 416.

There can be no doubt whatever of the jurisdiction of the subject-matter, which was the trial of an ordinary misdemeanor. The nature and extent of the jurisdiction are declared to be original, and "concurrent with the circuit courts, of *all misdemeanors* committed in Cullman county." This language is the same in substance with that of the Code, creating the jurisdiction of the county courts, which is found in section 718 of the Code of 1875: "County courts have original jurisdiction, concurrent with the circuit and city courts, of all misdemeanors committed in their respective counties."—Code, § 718.

The general rule undoubtedly is, that whenever a power or jurisdiction is conferred by statute, "everything necessary to make it effectual, or requisite to attain the end, is implied; and that where the law requires a thing to be done, it authorizes the performance of whatever may be necessary for executing its commands."—Sedg. Stat. Law, 92; Bacon's Abr. 16; Coke's Inst. 74. The same principle is thus stated by Mr. Dwaris, in enumerating the incidents of statutes: "In statutes incidents are always supplied by intendments; in other words, wherever a power is given by a statute, everything necessary to the making of it effectual is given by implication, for the maxim is, *Quando lex aliquid concedit, concedere videtur et id per*

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quod devenitur ad illud."—Potter's Dwarrior's Stat. p. 123; 2 Coke's Inst. 366.

Jurisdiction is defined to be the power to hear and determine, a cause, and has reference to both the subject-matter and the person.—Freeman on Judg. § 118; 2 Brick. Dig. 156, §§ 1, *et seq.* The subject-matter here is admitted to be a misdemeanor—the use of abusive, obscene, or insulting language in the presence of a female, and near a dwelling-house.—Code, § 4203. The method of prosecution before county courts is well defined by our code of procedure, which has prevailed in this State since the year 1866, when the system of county courts was first established. Any party aggrieved, or desiring to bring a charge of misdemeanor before a county court, is authorized to apply to the judge of such court, or to some justice of the peace of the county, for a warrant of arrest, and upon making a prescribed affidavit in writing, describing the offense and designating the name of the party charged, the warrant of arrest is required to be issued.—Code, § 4702. The arrest of the defendant, with the act of bringing him before the court, under this process, confers full jurisdiction of his person.

We are of opinion that the act of March 1, 1881, establishing "the county court of Cullman county," and conferring on it jurisdiction of all misdemeanors committed in the county, must be construed to carry with it, by necessary implication, the use of all process, or modes of procedure, authorized by law, and applicable to ordinary county courts, in the customary exercise of their similar jurisdiction. Our reasons for this conclusion are the following: The jurisdiction expressly conferred is entirely futile in the absence of all legal machinery for its exercise. It can not be supposed, therefore, that the intention of the General Assembly was to confer on this inferior court the power to try certain misdemeanors, and at the same time to withhold from it the use of ordinary process, without which the power conferred would be nugatory. — *Com. Kentucky v. Dennison*, 24 How. (U. S.) 66. The only two authorized methods of procedure, by which jurisdiction over the person of a defendant, charged with crime, can ordinarily be acquired, is by *indictment* or by *information*—the first being a formal charge preferred by a legally organized grand jury, and the other by warrant of arrest, supported by affidavit in writing. Our statutes require all indictments found by grand juries to be returned to the court under whose authority these bodies are organized.—Code, § 4821. The county court of Cullman county has no authority conferred on it to organize or empanel a grand jury, and no provision is made for transferring to it indictments pending in the circuit court. It is clear, there-

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fore, that no aid can be acquired from this source or method of obtaining jurisdiction.

The general provisions of the act under consideration strongly imply a legislative intention to authorize a resort to the ordinary machinery of the county courts. As we have said, the language conferring the jurisdiction in each case is almost identical.—Code, § 718; Acts 1880–81, § 2, p. 211. The same act creating the new court abolished the regular county court, by withdrawing the criminal jurisdiction of the probate judge of Cullman county, who was *ex officio* judge of the county court under the provisions of the general law. Code, §§ 719–720; Acts 1880–81, § 11, p. 214. Defendants, who are tried and convicted, have the same right of appeal to the circuit court as from the county courts, by complying with the same statute regulating such appeals.—Code, § 4724; Acts 1880–81, § 9, p. 213. While a petit jury is authorized, and provision made for its organization in *civil* cases, of which the new court has jurisdiction, none is provided for in *criminal* cases.—*Ib.* § 7, p. 212. It is further declared, that “*all processes* from said court shall be directed to the sheriff of Cullman county,” which is comprehensive enough to include *criminal* as well as *civil* processes.—*Ib.* § 3, p. 212. The policy of the law, dispensing with indictments in cases of misdemeanor, and authorizing prosecutions by information, in criminal proceedings before inferior courts, has long prevailed in this State, being specially provided for in three successive constitutions. Const. 1865, Art. 1, § 9; Const. 1868, Art. 1, § 10; Const. 1875, Art. 1, § 9. Its wisdom is fully sustained by the economy and convenience of the proceedings, and the speed with which justice can be administered. Though such methods are, in some respects, summary in their nature, the cases in which they are authorized involve minor offenses of no serious character, and the right of trial by jury is preserved in every instance unless waived by the defendant.—Code, §§ 4717, 4695. These considerations are of obvious importance in our efforts to construe the legislative intention, and present forcible reasons, as we believe, why the law-making power may have seen fit not to expressly provide in detail for the machinery of procedure needed for the exercise of the jurisdiction in question. They may well have proceeded on the principle, that statutes *in pari materia* are always to be read and construed together, and “that which is implied in a statute is as much a part of it as what is expressed,”—*U. S. v. Babbitt*, 1 Black, 61; Potter’s Dwar. 145.

The writ prayed for will be awarded, unless, on being informed of this opinion, the probate judge of Cullman county shall vacate and annul the judgment and proceedings upon the

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writ of *habeas corpus*.—*Ex parte The City Council of Montgomery, in re Knox*, 64 Ala. 463.

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Indictment for Carrying Concealed Weapons.

1. *Cross-examination of witness; when hostility to a party admissible.* As affecting credibility, it is permissible, on cross-examination, to inquire of a witness touching his relations to the parties, or to the subject-matter of controversy, or as to the feelings of sympathy, or partiality, or hostility which he may entertain, or may have expressed towards the party introducing him, or against the party against whom he is introduced; and also to show the degree or extent of such feelings.

2. *Same; when expression of hostility admissible.*—Hence, it is error for the primary court to refuse to allow the defendant in a criminal case to ask, on cross-examination, a witness examined by the State, who had testified that his feelings towards the defendant were unkind, whether he had not said, a short time prior to the trial, to one of defendant's counsel, that he would give \$1,000 to send the defendant to the penitentiary.

APPEAL from Lee Circuit Court.

Tried before Hon. H. D. CLAYTON.

Fed Yarbrough, defendant in the court below, was indicted, tried, and convicted for carrying a pistol concealed about his person. On the trial, on cross-examination of a witness examined on behalf of the State, the defendant, after showing by the testimony of the witness that his feelings were unkind to the defendant, asked him whether he had not said, a short time prior to the trial, to one of defendant's counsel, that he would give \$1,000 to send the defendant to the penitentiary. To this question the State objected, the objection was sustained, and the defendant excepted. This ruling is here assigned as error.

W. H. BARNES, for appellant, cited *McHugh v. State*, 31 Ala. 317.

H. C. TOMPKINS, Attorney-General, for the State.—(No brief came to the hands of the reporter.)

BRICKELL, C. J.—As affecting credibility, it is permissible, on cross-examination, to inquire of a witness concerning his relations to the parties, or to the subject-matter of controversy, or as to the feelings of sympathy, or partiality, or hostility which he may entertain, or may have expressed towards the

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party introducing him, or against whom he is introduced. If the witness, as in the present case, admits that he is unfriendly, or that his feelings are not kind to the party against whom he is called, the degree of his unkindness, or want of friendly feeling ought to be made known to the jury; for the same credit might not be attached to his testimony, if there was avowed hostility, that could properly attach to it, if there was mere indifference, or a mere absence of kind and friendly feeling. The expression or declaration of hostility, and a willingness to incur pecuniary loss to accomplish the personal disgrace and personal suffering of the party against whom he is testifying, it may be, will cause the jury to pause, before yielding full belief to his evidence. There seems to us no reason for doubt, that the court below erred in refusing to permit the inquiry to be made of the witness, which was embodied in the question propounded.—*Martin v. Martin*, 25 Ala. 201; *McHugh v. State*, 31 Ala. 317; 1 Green. Ev. § 450; 1 Whart. Ev. § 566.

Reversed and remanded.

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Indictment for an Assault with Intent to Murder.

1. *Threatening letters written by witness to defendant; when admissible.* Where on the trial of a defendant indicted for an assault with intent to murder, the person upon whom the assault was made was examined as a witness for the prosecution, letters written by the witness to the defendant, and received by the latter a short while prior to the assault, showing hostility to the defendant, and threatening in character, are admissible in evidence on behalf of the defendant, for the purpose of proving the witness' hostile feelings towards him, and of shedding light on the witness' credibility.

2. *Same; for what purpose not admissible.*—But where, in such case, the defendant is shown to have been the aggressor, the letters, although containing threats against the life of the defendant, can not excuse or extenuate the assault. Parties can not, under a pretext of self-defense, bring on a difficulty, and shield themselves from punishment by proof of previous threats.

3. *Motive or intention; how proved.*—Motive or intention is an inferential fact, to be drawn by the jury from proven, attendant facts and circumstances; an uncommunicated belief, motive, or intention can not be testified to by a party to a civil suit, when examined as a witness, nor can it be stated by a defendant in a criminal case in the unsworn statement which he is allowed to make under the statute.

4. *Sentence to hard labor or imprisonment on conviction for misdemeanor; how avoided by defendant on taking appeal.*—The statute (Code, §§ 4454-5) expressly provides that if the fine and costs are not paid, or a

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judgment confessed with sureties, the alternative sentence to hard labor or to imprisonment must be pronounced; and if the defendant, in such case, has reserved questions for the consideration of this court, he may prevent the imposition of the alternative sentence by a confession of judgment with proper sureties; for if the judgment of conviction is reversed, the judgment by confession, having no foundation to rest on, falls with it.

APPEAL from Montgomery City Court.

Tried before Hon. THOMAS M. ARRINGTON.

At the February term, 1883, of said court, John E. Burke, the defendant in the court below, was indicted for an assault on A. R. McCurdy with the intent to murder him; and at a subsequent day of the same term he was tried and convicted of an assault and battery. As shown by the bill of exceptions, "on the trial the State introduced evidence tending to show that on 14th December, 1882, the defendant assaulted, by shooting with a gun, A. R. McCurdy, whilst the latter was in the act of taking a drink at the Ruby Saloon in the city of Montgomery; that at the time defendant shot, the defendant said nothing to McCurdy, and McCurdy said nothing to the defendant, and McCurdy was standing in such a position as to be unable to see defendant; that McCurdy did not know of the presence of the defendant until he was shot; that he retreated out of the Ruby Saloon, and that defendant presented the gun, which was a double-barrel [shot-gun], and attempted to fire it a second time, but there was no cap on the tube, and it did not go off; that the defendant, armed with gun and pistol, rapidly pursued McCurdy, while retreating, into an adjoining store, where people, including ladies, were trading, and fired at McCurdy two barrels of the pistol, one from the sidewalk, and the other while in the store; that only one shot from the Ruby Saloon struck McCurdy, inflicting a painful, though not a dangerous wound with turkey shot"; that the store into which McCurdy retreated was not more than ten feet from the Ruby Saloon. To the evidence showing the shooting with a pistol after the combatants left the saloon, the defendant duly objected; but his objection was overruled, the evidence admitted, and he excepted. "Whilst McCurdy, the person shot, was being cross-examined as a witness, the defendant presented separately to him two letters, of which the following are copies, and asked the witness whether he wrote them, and whether the signature to the one, dated 13th December, was his, viz :

'Montgomery, Ala., Dec. 11.

'Mr. John Burke: So you have come back here again, and I will tell you now, this place is not large enough for us both, and I mean to stay; so you know what you must do. You also know the author.'

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‘Montgomery, Ala., Dec. 13.

‘Mr. John Burke: I wrote you on the 11th, telling you that you must leave this town, and did not sign any name to my letter. I see that you paid no attention to said note, so I write you again; this time I will let you know who it is from. You or I must go, as I said before. If you do not leave Montgomery by Sunday, you must look out for me; for after this I will not give you the least show in the world, if I get the drop on you.

A. R. McCURDY.’

“The letters purported to be in the same handwriting. The State objected to the question. The defendant then stated that he proposed to show that the handwriting of these letters was similar to that of said witness, and that the defendant had received them through the post-office, the last one the night before he assaulted said witness, and that the defendant believed that the said McCurdy had written both of said letters at the time he shot him. The court sustained the State’s objection to the question, and refused to allow it to be asked of the witness. To this action of the court the defendant excepted.” It was shown before the above question was asked, that the defendant had left Montgomery in October, 1882, and had returned on 10th December, 1882. The defendant, in connection with evidence tending to show that the letters had been written by McCurdy, and that defendant had received them through the post-office at Montgomery, and that defendant, at the time of the shooting, believed the letters were written by McCurdy, and that his life was in danger from McCurdy’s hands, offered separately to read them to the jury; but, on objection by the State, the court refused to allow the letters to be read in evidence, and the defendant excepted.

“The counsel for the defendant asked him, while he was on the stand making his statement, whether he had received said letters out of the post-office, and whether he believed, at the time he shot McCurdy, that McCurdy wrote them; and then proposed to read the letters to the jury as evidence, on the answer of the defendant in the affirmative; but the State objected to the question, and the court sustained the objection, and defendant excepted. And the court refused to allow the said letters to be read to the jury as evidence under any state of facts offered to be proved in connection therewith; and to this action of the court the defendant excepted.”

Other questions of evidence were raised in the court below and reserved for the consideration of this court; but as they are not discussed in the opinion, but passed on generally, the facts in reference thereto are not stated.

After judgment for the amount of the fine assessed by the jury, \$500, the entry proceeds: “And the same being unpaid,

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or otherwise secured, it is the judgment of the court that the defendant perform hard labor for the county of Montgomery for the term of one hundred and forty days, to pay said fine, and for such additional term, not exceeding eight months, at the rate of thirty cents per day, as will be sufficient to pay the costs of this prosecution." Then follows a suspension of the judgment, reciting that the defendant had reserved questions for this court, and entered into a recognizance as prescribed by statute.

This judgment and the rulings above noted are here assigned as error.

WATTS & SONS, for appellant. (1) The judgment entry should be modified, even if there should be an affirmance. If the judgment is affirmed, according to its literal interpretation, the defendant must be subjected to hard labor for the county, although he pays the fine and costs immediately on the affirmance. Can this be the law? A defendant on trial for a misdemeanor has the right to reserve exceptions to the rulings of the primary court, and the right to review those rulings in this court.—Code. § 4978. In such case judgment must be rendered on conviction, but its execution must be suspended, and the right to bail is given.—*Ib.* § 4981. On appeal this court renders such judgment on the record as the law demands.—*Ib.* 4990. Now, if the defendant pays the fine and costs, or confesses judgment therefor, he loses the right to revise the rulings of the court below; and if he does not pay or confess judgment, he must be sentenced to hard labor. Thus the defendant loses one right by exercising another; and, under this construction, one portion of the statute makes nugatory another. The proper construction must be one which will harmonize the statutes, one with the other; that, on affirmance in this court, the defendant still has the right to pay, and thereby avoid the alternative sentence; or else, this court, when it affirms, should so provide in its judgment of affirmance. (2) The letters were admissible to show McCurdy's unfriendly and hostile feelings towards defendant.—*Yarbrough v. State, ante p. 376.* (3) They were also admissible as showing a communicated threat against defendant's life. Such threats are always competent, when communicated, if recently made. They tend to show the state of mind of the prosecutor towards the defendant at and about the time of the conflict. This the jury have a right to see, so far as they can. Whether the defendant would be excused for acting on such threats, depends upon the other facts taken in connection with the threats, and this is for the jury to determine. We submit that they were of such a character as to admit of no waiting for any demonstration, except

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that which grows out of the very threats themselves. The following authorities cited and discussed on this point:—*Burns v. State*, 49 Ala. 372; *Pridgen v. State*, 31 Tex. 420; *Jackson v. State*, Cases on Self-Defense (Horr. & Thomp.) pp. 476-487; 6 Baxter, 452; *Keener v. State*, 18 Ga. 194; *State v. Collins*, 32 Iowa, 36; *State v. Hays*, 23 Mo. 287. (4) They were competent, also, in connection with, and as a part of the defendant's statement. The defendant had the right to speak of, and to state his motive in shooting; and he had the right to show the grounds on which the motive was based.—*Brewer v. Watson*, ante, p. 299. "The following cases discuss and fully settle the question, and show the reasons, unanswerable reasons, why a man, who is a competent witness, may testify to his own motives or intentions.—*Watkins v. Wallace*, 19 Mich. p. 76; *Berkey v. Judd*, 22 Minn. p. 297; *Edwards v. Currier*, 43 Me. pp. 483-4; *Thurston v. Cornell*, 38 N. Y. 281; *Thacher v. Phinney*, 7 Allen, 146; *Ib.* 155; *Fisk v. Inhabitants of Chester*, 8 Gray, p. 508; *Snow v. Paine*, 114 Mass. 520; *Green v. State*, 53 Ind. 420; *White v. State*, 53 Ind. 595; *People v. Farrel*, 31 Cal. pp. 582-4. The case in 51 Ala. 171, cites no authorities, and has been followed in several cases, in none of which is the question discussed.

H. C. TOMPKINS, Attorney-General, for the State.—The letters offered in evidence could have been admissible only upon the theory that they contained threats against the defendant by the person assaulted. But the rule is well settled that threats, communicated or uncommunicated, are never admissible in cases of this kind, unless there is some evidence tending to show that, at the time the assault was committed, the party assailed was making some demonstration indicating a purpose to carry them out. Clearly such was not this case.—Whart. on Crim. Ev. §§ 84, 757; *Pritchett v. State*, 22 Ala. 39; *Payne v. State*, 60 Ala. 80; *Holly v. State*, 55 Miss. 424; *Myers v. State*, 33 Tex. 525; *State v. Alexander*, 66 Mo. 162; *Roberts v. State*, 68 Ala. 156.

STONE, J.—The letters offered in evidence, if proved to have been written by the witness on whom the assault was made, should have been received in evidence, *solely* for the purpose of shedding light on the credibility of the witness. Before going before the jury, however, there must have been proof made, tending to show their genuineness. They were admissible only to prove the hostile feelings of the witness towards the accused; for juries, in passing on controverted facts, have a right to know the relations of friendship or hostility which the witness bears to the parties. It is a proper

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subject to be considered in determining the weight of testimony.—*Yarbrough v. State*, ante p. 376; *McHugh v. State*, 31 Ala. 317.

The letters, however, even if genuine, and if received by the accused, did not and could not offer any excuse or extenuation of the assault, which the testimony tends to show he committed. And it is alike the duty of the presiding judge to so instruct the jury, and of the jury to obey the instruction. *Roberts v. State*, 68 Ala. 156; *DeArman v. State*, ante p. 351. Parties can not, under a pretext of self-defense, bring on a difficulty, and shield themselves from punishment by proof of previous threats. The present record affirms it contains all the evidence, and under its statements, the letters, whether genuine, or believed to be genuine, furnish neither excuse nor palliation for the assault it tends to prove.

Since parties have been made competent witnesses in their own favor, we have several times ruled that they can not testify to their own uncommunicated motives or intentions.—*Alexander v. Alexander*, ante p. 295. Such motive or intention, when a material subject of inquiry, must be proved as it was proved before parties were allowed to testify in their own behalf. It is an inferential fact, to be drawn by the jury from proven, attendant facts and circumstances, if sufficient. And *Brewer v. Watson*, ante p. 299, does not depart from this principle, but in fact re-affirms it. It let in the facts and information under which Brewer acted, but not the uncommunicated motive which prompted him. That was left for the jury to infer or not, as the attendant facts and circumstances might, or might not convince them. A prisoner's unsworn statement to the jury, under the act of the last session, must be governed by the same rules. He can not state his own uncommunicated belief, motive, or intention.

In regard to the sentence to hard labor, imposed by the court as alternative punishment, the statute expressly provides that if the fine and costs are not paid, or a judgment confessed with sureties, then the alternative sentence must be pronounced. Code of 1876, §§ 4454–5. The City Court only pursued the statute. The hardship anticipated will not be found to exist, if persons, convicted of misdemeanors and fined, will confess judgment with the proper sureties. Such confession prevents the imposition of the alternative sentence; and if the judgment of conviction is reversed, the confessed judgment, having no foundation to rest on, falls with it.

On the one ground first above pointed out, the judgment of the City Court is reversed, and the cause remanded. Let the accused remain in custody until discharged by due course of law.

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Whizenant v. State.*Indictment for Grand Larceny.*

1. *Defendant making statement not subject to cross-examination.*—When a defendant in a criminal case makes a “statement” under the statute, he is not subject to cross-examination by the State; and it is a reversible error for the primary court to allow such cross-examination against his objection.

2. *Motive or belief; how proved.*—It is for the jury to infer motive, belief, or intention, when a material issue, from the facts and circumstances in the case; they can neither be testified to by witnesses, nor made a part of a defendant’s statement.

3. *Witness’ belief or conclusion; when inadmissible.*—On the trial of a defendant indicted for the larceny of two oxen, the evidence connecting the defendant with the larceny tending to show a sale by him of two oxen in witness’ presence, and the question being one of identity, it is not permissible for the witness to prove a previous unsworn description which another, when in search of the stolen oxen, had given him, and his belief or conclusion that the description given him corresponded with his recollection of the oxen which the defendant sold in his presence.

4. *Stolen goods carried into another county; when conviction may be had therein.*—Larceny not changing the ownership or lawful possession of the stolen property, if the thief carry it into another county, or have it so carried, and there exercise dominion over it, this constitutes larceny in such county, and the thief may be indicted and convicted therein.

APPEAL from Jefferson Circuit Court.

Tried before Hon. SAMUEL H. SPROTT.

Henry Whizenant, defendant in the lower court, was indicted, tried and convicted for the larceny of two steers or oxen, the property of Amanda Blackburn. The evidence for the prosecution tended to show the commission of the offense in Shelby county, in August, 1882, and that the steers were afterwards carried to Birmingham, in Jefferson county. To connect the defendant with the offense, the State examined as witnesses Miles and Shafer, who testified that about the time of the larceny Miles purchased from the defendant at Birmingham two steers. Miles testified that the steers which he bought from the defendant were “white and black spotted.” The State examined also as a witness one Wright, who testified that he knew the steers which had been stolen; that they were “white and black spotted;” and that he, having received information that they had been seen in Birmingham, went there in search of them, and saw Miles and Shafer, to whom he gave a description of the stolen steers. Shafer testified that he was present when Miles purchased two steers from defendant, but

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that he did not remember their description ; that Wright, when in search for the steers which had been stolen, described them to him, but the defendant was not then present. The court then allowed this witness to testify, in answer to a question propounded on behalf of the State, and against the defendant's objection, that the description given him by said Wright corresponded with that of the steers which Miles had purchased from the defendant; and the defendant excepted.

The defendant made a statement under the statute, the purport of which, so far as set forth in the bill of exceptions, tended merely to show an *alibi*; and, against the defendant's objection, the court allowed the State to cross-examine the defendant touching matters stated by him in making his statement; and he excepted.

The court charged the jury, *ex mero motu*, that if they believed from the evidence, beyond a reasonable doubt, that, in August, 1882, the steers of Amanda Blackburn were stolen by the defendant in Jefferson county, or in an adjoining county, and brought into Jefferson county by him, then they must find the defendant guilty; and refused to charge the jury at the written request of the defendant, in substance, that if they believed from the evidence, that the steers alleged to have been stolen, were stolen in Shelby county, they must find the defendant not guilty. The defendant excepted to the charge given, and to the refusal of the court to charge as requested; and he here assigns those rulings, and the ruling of the court on the evidence above noted, as error.

E. W. COLEMAN, for appellant.

H. C. TOMPKINS, Attorney-General, for the State.

(No briefs came to the hands of the reporter.)

STONE, J.—In *Chappell v. State*, ante p. 322, we construed the act under which defendants in criminal cases are allowed “to make a statement as to the facts in their own behalf, but not under oath.” Under the ruling there made, this cause must be reversed.

And in *Burke v. State*, ante p. 377, we ruled that a defendant, in making his statement, should not be allowed to state his own motive, belief, or intention, unless that motive, belief or intention was made known at the time the act was done, the facts of which he is permitted to state. It is for the jury to infer the motive, belief, or intention, from the facts and circumstances in the case, such as witnesses could testify to; and inasmuch as witnesses can not know, and therefore can not

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testify to the uncommunicated belief, motive or intention of the defendant, neither can the defendant make it a part of his statement.

Wright, the witness, testified to a description of the steers, which were alleged to have been stolen. Miles testified to a description of two steers he said he had purchased from the defendant. This was certainly proper testimony to be weighed by the jury, in connection with the other evidence in the cause, in determining whether the steers alleged to have been lost, were the same steers which were, according to the testimony of Miles, sold to him by the defendant. It was not, however, permissible to prove any previous unsworn description the witness Wright may have given, nor the belief or conclusion of the witness Shafer, that that description corresponded with his own recollection of the steers he saw sold to Miles. It could not legitimately be made the basis of a comparison by the witness, nor could his conclusion or opinion, based thereon, be given to the jury as evidence. Nor was it admissible, in corroboration of the witness Wright. The whole subject was one of identity, and that was for the jury to determine.—See 1 Greenl. Ev. § 469; *Nichols v. Stewart*, 20 Ala. 358; *Childs v. State*, 55 Ala. 25.

Larceny does not change the ownership or lawful possession of property. Consequently, if the thief carry the stolen goods into another county, or have them so carried, and there exercise dominion over them, this constitutes a theft in the latter county; and the indictment, prosecution and conviction may be had in that county.—*Smith v. State*, 55 Ala. 59; *Lucas v. State*, 62 Ala. 26.

On the two questions above noted, the judgment of the Circuit Court is reversed, and the cause remanded. Let the accused remain in custody until discharged by due course of law.

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Indictment for Murder.

1. *Insanity as defense for crime; burden of proof.*—When insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury, by a preponderance of the evidence; and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal. (BRICKELL, C. J., *dissenting*.)

2. *Insanity fitful or occasional in character; not presumed to be continuous.*—It is only insanity of a chronic or permanent nature which, on be-

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ing proved, is presumed to continue; there is no presumption that fitful and exceptional attacks of insanity are continuous.

3. *Same; offense presumed to have been committed in lucid interval.* Where an insane person "has lucid intervals, the law presumes the offense of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper."

4. *Voluntary drunkenness no excuse for crime.*—While voluntary drunkenness may some times operate to rebut the existence of malice, so as to reduce the grade of homicide, or other crime of which malice is a necessary ingredient, and, in many instances, a man may be so drunk as to be incapable of forming or entertaining any specific intention at all; yet, it can not be said, in any proper sense, that intoxication excuses the crime committed under its influence, or that the defendant should on that account be entirely acquitted of guilt.

5. *Threats by defendant against deceased; admissibility of.*—While threats by the defendant to kill *one* man may not be admissible under an indictment for the murder of, or assault with intent to murder *another*, threats to kill or injure some one not definitely designated, especially when made shortly before the commission of the offense to which they may be construed to have reference, are admissible in connection with other explanatory circumstances, on proof of the *corpus delicti*. It is a matter of mere inference whether the deceased came within the scope of such threats; and their weight or probative force is a question entirely for the jury.

6. *Homicide; what admissible as an act of preparation.*—On the trial of a defendant for murder, it being shown that the homicide was committed in the afternoon, and that the defendant and deceased had had a difficulty in the morning of the same day, and that bad feelings existed between them during the intervening hours,—*held*, that the primary court committed no error in admitting the testimony of a witness for the State, against defendant's objection, to the effect that after the first difficulty, and a short time prior to the fatal act, the defendant had proposed to exchange knives with the witness, showing him at the time a small knife, and assigning as a reason, that his knife was too small. Such testimony may have been comparatively weak, but it was clearly relevant as an act of preparation, when taken in connection with the previous difficulty, and bad feelings between the parties.

7. *Charge assuming truth of evidence, where there is a conflict, properly refused.*—Where the evidence for a defendant on trial for murder tends to show that he was free from fault, and that he could not apparently have retreated with safety, but the evidence for the prosecution tended to prove the contrary, charges requested by the defendant as to self-defense, which assumed the truth of the evidence on his behalf, thereby withdrawing from the jury all consideration as to the truth or falsity of the conflicting evidence, are properly refused.

8. *Competency of witnesses who are not experts on question of insanity vel non.*—Where a witness who is not a medical expert expresses an opinion, affirming the insanity of a party, it is the better and safer practice that his opinion should be preceded by the facts and circumstances upon which it is based, they being necessarily eccentric manifestations and abnormal facts affirmative in their nature; but where the witness testifies to the sanity of a party, there may be no such eccentric manifestations or abnormal facts, and "he may testify to the non-existence thereof by way of general negative."

9. *Same.*—The competency of the witness in such case depends simply upon the fact, that he has an acquaintance with the party whose sanity is in issue, of sufficient duration and intimacy to have afforded him opportunities for such frequent observation as to justify the formation of a correct opinion.

10. *Same.*—It is impossible to lay down any precise rule as to the

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length or character of acquaintance which will render the opinion of such witness admissible; and it must rest, to a considerable extent, within the sound legal discretion of the primary court.

11. *Evidence; when party can not complain of ruling of primary court allowing irrelevant evidence.*—When a defendant in a criminal case, on direct examination of his own witness, elicits irrelevant evidence, he can not complain that the prosecution is allowed, on cross-examination, to bring out other irrelevant evidence, by way of explanation or rebuttal, touching the same subject-matter.

APPEAL from the City Court of Montgomery.

Tried before HON. THOMAS M. ARRINGTON.

Joseph Ford, defendant in the lower court, was indicted for the murder of William Y. House, “by striking him with a brick or brickbat;” and he was convicted of murder in the second degree, and sentenced to the penitentiary for ten years.

The evidence for the prosecution tended to show that on the 14th June, 1882, in the afternoon between five and six o'clock, the defendant struck the deceased with a brickbat about half the size of a brick, near the post-office in the city of Montgomery, and the deceased died on the following day from the effects of the wound; that about eleven o'clock on the morning of the fatal act the defendant and deceased had a quarrel in a bar-room, and that bad feelings existed between them during the day; that the defendant during the day made several threats against the deceased; and that both parties had been drinking, and were somewhat under the influence of intoxicating liquors at the time of the killing. The evidence for the State further tended to show that the defendant brought on the difficulty that resulted in the death of the deceased, and struck the latter without any provocation. On the other hand, some evidence was introduced by the defendant, tending to show that he acted in self-defense.

Insanity was one of the defenses set up by the defendant, and, for the purpose of proving it, he examined several witnesses, whose testimony is given at length in the bill of exceptions. The testimony of these witnesses tended to show that the defendant was a man of weak mind, and that he was, and had been for several years subject, when under the influence of excitement, produced by passion or drink, to mental aberrations, and occasional and fitful attacks of insanity; numerous acts, at different times and places, done by the defendant, excentric and abnormal in their character, being testified to; and the opinions of witnesses given, that at such times the defendant was insane. The testimony of these witnesses further tended to show that the defendant's father was subject, under the same conditions, to similar attacks, and that two of his brothers and a sister were of unsound mind. There was a conflict in the evidence, how-

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ever, as to the insanity of the defendant, of his father, and of one of his brothers.

The State examined several witnesses, who were not medical experts, in rebuttal of the testimony offered by the defendant as to the insanity of himself, his father, and one of his brothers, whose testimony tended to show that all three of them were of sound mind. The testimony of the witnesses as to the sanity of the father and brother, and that of some of the witnesses as to the defendant's sanity showed an intimate acquaintance with them of several years duration. One of the witnesses for the State as to the sanity of the defendant testified touching his knowledge of the defendant, and his acquaintance with him, substantially as follows: He had known defendant since he was a boy, and had met him almost daily, but had not been intimate with him. Witness only knew defendant's business from hearsay; had met him on the streets numbers of times; had seen him at the depot, on the engine out on the road (the defendant having been shown to have been at one time a fireman on a locomotive), and at conventions, elections and other places; had a good many conversations with him, but never had a long conversation with him; did not suppose that he ever had a conversation with him that lasted over five minutes. Another witness testified as to his acquaintance with, and knowledge of the defendant as follows: "That he had known defendant since he (defendant) was a boy; have met him casually on the streets, sometimes by himself, and sometimes in crowds; have talked with him on the streets, and have heard him talk to other people; have just heard him talking generally; have conversed with him, and have heard him converse with others frequently, and at divers times in a long course of years." The State asked each of the witnesses examined by it as to the defendant's sanity, after making preliminary proof by him of his acquaintance with, and knowledge of the defendant, as stated above, whether, in his opinion, the defendant was sane or insane. To this question, as propounded to each of the witnesses, the defendant objected, on the ground that the facts stated by the witnesses did not show that he had sufficient knowledge of the defendant to testify as to his sanity or insanity; but his objection was overruled, and the witness allowed to answer the question, and the defendant excepted. In answer to this question each witness answered, in substance, that, in his opinion, the defendant was sane. Similar proof was made as to the defendant's father, and as to one of his brothers, similar questions propounded, answers given, and exceptions reserved.

One Cheatham, a witness examined by the defendant as to the defendant's sanity, testified on direct examination that after the defendant's arrest, the defendant sent for him, and he went

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to the jail to see him ; and, after talking with him awhile, witness asked him what he wanted to know, and why he had sent for him ; and that he replied that he wanted to know when the August election was coming on, and asked witness to tell a certain candidate that he, defendant, wanted to take a hand. On cross-examination by the State, this witness was allowed to testify, against the defendant's objection, (1) that said candidate was a man of considerable influence ; (2) that at a certain primary election between said candidate and his opponent, the defendant worked for said candidate and against his opponent ; and (3) that in said primary election the witness was a partisan of said candidate, and that the defendant knew this fact. The defendant duly reserved exceptions to the questions calling for this testimony, and to the rulings of the court overruling his motions to exclude the answers from the jury.

An exception was also reserved by the defendant to certain testimony elicited by the State from one Malloy ; but the character of this testimony is sufficiently indicated in the opinion. An exception was also reserved by the defendant to the admission in evidence of certain threats made by the defendant, the character of which is indicated in the opinion.

The bill of exceptions purports to set out all the evidence ; and after the general charge, to which no exceptions were reserved, the court, at the written request of the State's solicitor, gave to the jury the following, among other, charges : 3. "When the plea of insanity is set up as a defense, the burden of proof is on the defendant to show that, at the time the fatal blow was given, he, defendant, was so insane as to be unable to distinguish between the right and wrong of the act being done, i. e. the killing ; and he must show this to the satisfaction of the jury by a preponderance of the evidence." 4. "Drunkenness is no excuse for crime ; and if the jury believe from the evidence beyond a reasonable doubt, that at the time defendant killed House, he, defendant, was drunk or intoxicated, he should not be excused or acquitted on that account." 5. "If the defendant has failed to satisfy the jury by a preponderance of all the evidence, that, at the time he struck House the fatal blow, he, defendant, was insane ; or if a preponderance of all the evidence satisfies the jury that at said time defendant was sane, then the jury should not excuse or acquit the defendant on said plea of insanity." 6. "The law presumes sanity, and that presumption must prevail until it is overcome ; and insanity is a defense which must be proved to the satisfaction of the jury by that measure of proof which is required in civil cases ; and a reasonable doubt of defendant's sanity, raised by all the evidence, does not authorize an acquittal. And when insanity is set up as a defense in a criminal case, whether the evidence of it

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arises out of the testimony which proves the commission of the act, or is shown *aliunde*, it is insufficient, unless it overturns the presumption of sanity; and moral insanity, which consists of irresistible influence, co-existing with mental sanity, has no support either in psychology or law." To each of these charges the defendant excepted.

The defendant also reserved exceptions to the refusal of the court to give the following, among other, charges requested by him in writing: 17. "If upon the evidence the jury have a reasonable doubt that Ford was sufficiently sane and in his right mind, to know the difference between right and wrong in striking House with the piece of brick at the time he struck House with the piece of brick, the jury must find the defendant not guilty." 24. "If after the consideration of all the evidence in the case, the jury have a reasonable doubt as to whether the defendant was insane or not, at the time he struck House with the piece of brick, they must find the defendant not guilty." 25. "The burden is on the State to prove all that is necessary to constitute the crime of murder; and, as that crime can only be committed by a person of sane mind, the burden is upon the State to prove that the defendant was sane, when he committed the act of killing. 29. "If the jury believe from the evidence that insanity existed in the family of the defendant prior to the homicide, and that, among others of the family of defendant, his father was insane at intervals; and if the jury further believe from the evidence that the defendant had been suddenly or temporarily insane before the homicide in this case was committed by defendant, then the burden of proof is on the State to show that, at the time the offense in this case was committed by defendant, he was sufficiently sane to realize the consequence of his act."

The rulings of the City Court above noted are here assigned as error.

BRAGG & THORINGTON, and J. M. FALKNER, for appellant. (1) The court erred in overruling the motion to exclude the testimony of the witness Malloy in reference to the proposal of the appellant to swap knives with him. There was nothing in this evidence that connected it directly or indirectly with House, or with the difficulty with House. (2) The court erred in overruling the objection of the appellant to the testimony of Cheatham. This was wholly irrelevant, and was calculated to prejudice the jury against the accused. (3) The court erred in overruling appellant's objections to the questions calling for witnesses' opinion as to the sanity of the defendant.—*Roberts v. Trawick*, 13 Ala. 63; *Norris v. State*, 16 Ala. 778; *Powell v. State*, 25 Ala. 29; *State v. Brinyea*, 5 Ala. 243. (4). "A

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sense of duty compels us to earnestly and respectfully insist before this court, that the rule laid down, as to the burden of proof in cases of insanity, in the case of *Boswell v. State*, 63 Ala. pp. 324-6, is unsound, and has been productive of great injustice and injury to the accused in this case on the trial in the court below. The able and learned opinion in that case is, it is true, sustained by the authorities there cited, and also by other authorities, which were doubtless considered by the court in deciding that case; but we respectfully submit that the better rule, a more just rule, and a rule which is more in accordance with the reason, with the logic, and with the humanity of the law, is laid down in the following authorities:—*State v. Garbutt*, 17 Mich. 9; *State v. O'Connell*, 87 N. Y. 377; *State v. Cunningham*, 56 Miss. 269; *State v. Chase*, 40 Ill. 352; *State v. Crawford*, 11 Kan. 32; *State v. Wright*, 4 Neb. 408; *State v. Jones*, 50 N. H. 369; *State v. Dove*, 3 Heisk. (Tenn.) 348; *State v. Guetig*, 66 Ind. 94. Many other authorities might be cited, but only leading cases have been selected where the whole subject is discussed." Upon these authorities it is contended, that the court erred in its several rulings on the charges on insanity. (5) The charge numbered 3, given at the request of the State, is erroneous, because it directs the jury to find according to the preponderance of the evidence.—*Mays v. Williams*, 27 Ala. 267; *Vandeventer v. Ford*, 60 Ala. 610.

H. C. TOMPKINS, Attorney-General, for the State. (1) The threats made by defendant, not directed against any known person, as well as the effort to exchange his knife for a larger one, were all made after the first difficulty with deceased in the morning. The testimony tended to show that from that time on the defendant continuously harbored a purpose to avenge a supposed affront by deceased, and to prepare himself to take his life, or to do him great bodily harm. There was evidence of threats made during the interval directly against deceased, and of preparation made to injure him. Certainly, in connection with the other evidence in the case, the jury had a right to infer that these threats were intended for deceased, and that the effort to procure a larger knife was an evidence of his purpose to do him harm. The acts of the defendant from the time of the first quarrel constituted one continuous transaction, and evidence of any fact which tends, even in the slightest degree, to show his state of mind, or throw light upon his purposes was proper for the consideration of the jury.—*Campbell v. State*, 23 Ala. 44; *Armor v. State*, 63 Ala. 173; Whart. on Crim. Ev. §§ 753-6. (2) The evidence elicited by the defendant from the witness Cheatham touching the August election was irrelevant; and hence, the testimony on cross-examination, if irrelevant, was

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merely explanatory of the irrelevant testimony brought out by the defendant on direct examination ; and he can not be heard to object. (3) The witnesses examined by the State were fully competent to testify to their opinions of the sanity of defendant.—*Powell v. State*, 25 Ala. 21 ; *Walker v. Walker' Ex.* 34 Ala. 469 ; *Stubbs v. Houston*, 33 Ala. 555. (4) No principle of law is better settled than that one who prepares himself for, and brings on a difficulty with another, can not excuse himself for taking the life of that other upon the ground of self-defense. No party can justify on that ground, where the evidence shows that he brought on, or encouraged the difficulty, or that there was no reasonable apprehension of loss of life, or great bodily harm, or that there was other reasonable mode of escape from the danger.—*Cross v. State*, 63 Ala. 40 ; *Eiland v. State*, 52 Ala. 322 ; *Mitchell v. State*, 60 Ala. 26 ; *Myers v. State*, 62 Ala. 599 ; *McNeezer v. State*, 63 Ala. 169 ; *Ingram v. State*, 67 Ala. 67. (5) The law in this State does not recognize so-called temporary insanity. Any man whose passions are aroused beyond control, may be said to be temporarily insane ; but that does not justify crime. The insanity which excuses from the penalties of crime must be something more than a temporary dethronement of reason. So it may be taken as settled by *Boswell's case*, 63 Ala. 307, that, to make out the defense of insanity, defendant must do more than create by the evidence a reasonable doubt of his sanity ; he must establish the fact to the satisfaction of the jury by that measure of proof which is required in civil cases. That case lays down the true rule both in principle, and as held by a majority of decisions ; and the court is referred to the following authorities sustaining and defending the principle, not referred to in that case : Whart. on Crim. Ev. § 340 ; *Dejarnette v. Commonwealth*, 75 Va. 867 ; *McLean v. State*, 16 Ala. 672 ; *State v. Bruce*, 48 Iowa, 530 ; *State v. Grear*, 29 Minn. 221 ; *Carter v. State*, 56 Ga. 463 ; *Webb v. State*, 9 Tex. (Ct. of Ap.) 490 ; *Johnson v. State*, 10 *Ib.* 571 ; *State v. Hoyt*, 46 Conn. 330 ; *Coyle v. Commonwealth*, Amer. Law Reg. vol. 22, p. 191 ; Code of 1876, § 1487.

SOMERVILLE, J.—The main question presented for our consideration in this case relates to the rule governing the burden and sufficiency of proof in criminal cases, where the defense of insanity is interposed. This question was fully and elaborately considered by this court in *Boswell's case*, 63 Ala. 307, decided in the year 1879, where the authorities on the subject in both England and America are lucidly reviewed in the opinion of Mr. Justice STONE, speaking for a majority of the court. The doctrine is there held, that *insanity* is a de-

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fense which must be established *to the satisfaction of the jury, by a preponderance of the evidence*, and a reasonable doubt of the defendant's sanity, raised by all the evidence, *does not authorize an acquittal*. A strong appeal is made by counsel, urging that this case, which was decided by a majority of the court, should be overruled, as repugnant to the sound logic of the law, and not in harmony with settled analogies of criminal jurisprudence. I confess, if the question were a new one, that, apart from authority, I should be greatly disposed to favor the view, that although the law presumes sanity, it at the same time presumes innocence, that these presumptions are each disputable, and must go to the jury, to be considered by them in connection with the other evidence; and that if the jury, upon the facts and conflicting presumptions of the whole case, entertain a reasonable doubt that the crime charged was committed by the prisoner while in a sane state of mind, he is entitled to an acquittal. This is the modern or strictly American doctrine, and finds no countenance, so far as I can discover, among the best law-writers or adjudged cases in England. It seems to be approved by Mr. Bishop alone of the American text-writers, and finds support in the decisions of only some nine or ten of the highest courts of the several States.—2 Bish. Cr. Proc. § 673; *O'Connell v. The People*, 87 N. Y. 377; *Cunningham v. State*, 56 Miss. 269; *People v. Garbutt*, 17 Mich. 9; *State v. Crawford*, 11 Kansas, 32; *Guetig v. State*, 66 Ind. 94 (S. C. 32 Amer. Rep. 99); *Chase v. People*, 40 Ill. 352; *Wright v. People*, 4 Neb. 407; *State v. Jones*, 50 N. H. 369; *Dove v. State*, 3 Heisk. (Tenn.) 348; *State v. Patterson*, 45 Vt. 308; *State v. Waterman*, 1 Nev. 543.

The doctrine of *Boswell's case*, which repudiated the ordinary rule of "reasonable doubt" as applicable to insanity cases, is, however, sustained by the great weight of authority. It seems to be approved by all of the English text-writers and adjudged cases, coming with the sanction of the common law, which, for many forcible reasons, placed insanity upon a basis somewhat different from other defenses.—*McNaghten's case*, 10 Cl. & Fin. 200; *Reg. v. Higginson*, 1 C. & K. 130; 1 Russell on Cr. (9th Ed.) 5–25. It is said in Roscoe's Criminal Evidence that "the *onus* of proving the defense of insanity, or, in the case of lunacy, of showing that the offense was committed when the prisoner was in a state of lunacy, lies on the prisoner."—Roscoe's Cr. Ev. (7th Ed.) 975. In Foster's Crown Law it is said, "all the circumstances of accident, necessity or *infirmit*y, are satisfactorily to be proved by the prisoner."—Fost. 255.

Among the American authors Mr. Wharton strongly favors the view, that the burden of proof is on the defendant to prove

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his insanity by a preponderance of the evidence—the defense being said to be extrinsic, and likened to an application in “the nature of a plea to the jurisdiction, or a motion to change the venue.”—Whart. Hom. § 668; Whart. Cr. Ev. § 340; Whart. Cr. Law (7th Ed.) § 54. Mr. Greenleaf says that the defense “must be clearly proved:” and again, that it “must be established by evidence satisfactory to the jury.”—2 Greenl. Ev. § 373; 3 *Ib.* § 5. The adjudged cases in this country present a vast weight of authority favorable to the doctrine of *Boswell's case*, or at least in repudiation of the rule entitling the defendant to an acquittal upon the existence of a mere reasonable doubt of his sanity. Many of these cases state the rule more strongly against the defendant, and some go to the length that the defendant must establish his insanity to the satisfaction of the jury, beyond a reasonable doubt. These views prevail in some eighteen or twenty of the States.—*McAllister v. State*, 17 Ala. 434; *Com. v. Heath*, 11 Gray (Mass.) 303; *Sayres v. Com.* 88 Penn. St. 291; *State v. Felter*, 32 Iowa, 49; *State v. Payne*, 86 N. C. 609; *Graham v. Com.* 16 B. Mon. (Ky.) 587; *State v. Strauder*, 11 West Va. 745, 823; *State v. Stark*, 1 Strob. (S. Ca.) Law, 479; *State v. Lawrence*, 57 Me. 574; *State v. Redemeier*, 71 Mo. 173; *Bergin v. State*, 31 Ohio, 111, 115; *Webb v. State*, 9 Tex. (Ct. Ap.) 490; S. C. 35 Amer. Rep. 32, note; *Boswell's case*, 20 Gratt. (Va.) 860; *People v. Messersmith*, 57 Cal. 575; *State v. Gut*, 13 Minn. 341; *McKenzie v. State*, 26 Ark. 334; *Carter v. State*, 56 Ga. 463; *State v. Spencer*, 1 Zab. (N. J.) 196, 201; *State v. Danby*, 1 Hous. Cr. Cases (Del.) 166, 175; *State v. Hoyt*, 46 Conn. 330.

In view of these considerations we are of opinion that the rule declared in *Boswell's case* should not be disturbed. It establishes a rule greatly favorable to the preservation of human life, and to the good order and peace of society. It discourages the recognition of that species of frenzy, known as “moral” or “emotional” insanity, which, without any support in the law, sometimes finds countenance at the hands of juries in contempt of its integrity. It is based upon the broad presumption, which receives universal recognition in all the affairs of life, that sanity is the normal condition of all mankind, and upon the teachings of experience that criminals often take refuge in attempting the simulation of insanity under circumstances rendering it most difficult of detection. The history of criminal jurisprudence in this country, it is apprehended, fails to show any danger from the inhumanity of juries in the harsh or unreasonable administration of the rule.

This rule, it may be added, fully harmonizes with the provisions of our statute authorizing the judges of our circuit courts to order an inquisition in the case of criminals alleged

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to be insane, with the view of committing them to the State hospital for insane persons. The commitment is authorized "if it be *satisfactorily proved* that the person is insane," and he is required to remain in custody until he is restored to his right mind.—Code, 1876, §§ 1487-88. It is manifest that great confusion might follow in the administration of justice, if one rule should be adopted in the trial of defendants alleged to be insane, and another in judicial inquisitions. A case might not be improbable where a prisoner, charged with murder, might be acquitted on the ground of homicidal insanity, because of the bare existence of a reasonable doubt, and yet there might not be such a preponderance of evidence against him as to satisfy the judge or jury of his insanity in a judicial inquisition. One dangerous to the community would thus be set at large, beyond the pale of legal punishment or custody, until a second or third homicide might operate to remove the existing reasonable doubt.

We find no error in the rulings of the court, relevant to the defense of insanity, which can authorize a reversal of the judgment under the above views.

There is no presumption that fitful and exceptional attacks of insanity are continuous—a proposition manifest in itself. It is only insanity of a chronic or permanent nature which, on being proved, is presumed to continue.—Whart. Cr. Ev. § 730. The rule, therefore, prevails that where an insane person "has lucid intervals, the law presumes the offense of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper."—1 Russell on Cr. 11; 1 Hale, 33-4. Charge number twenty-nine, requested by the defendant, was properly refused on this principle. There was no evidence tending to show that the alleged insanity of the prisoner was any thing more than fitful or occasional.

The principle is everywhere recognized, that voluntary drunkenness or intoxication is no *excuse* for the commission of crime. Roscoe's Cr. Ev. 985; 1 Arch. Cr. Pl. 11-14. This in nowise conflicts with the rule, that it may some times operate to rebut the existence of *malice*, so as to reduce the grade of the homicide, or other crime, of which malice is a necessary ingredient. So, in many instances, a man may be so drunk as to be incapable of forming or entertaining any specific intention at all.—*Mooney v. State*, 33 Ala. 419; *Ross v. State*, 62 Ala. 225; 1 Russ. on Cr. 12-13. Yet it can not be said in any proper sense that the existence of intoxication excuses the crime committed under its influence, or that the defendant should on that account be entirely acquitted of guilt.—1 Bish. Cr. Law, § 400. The fourth charge, given at the instance of the State, was free from error.

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If its tendency was merely misleading, as being too broad in its application to a particular phase of the case, an explanatory charge should have been requested.

Threats made by a defendant are generally admitted as tending to prove malice on his part against a deceased person with the killing of whom he is charged. To be admissible they must of course be capable of such construction as that they may have reference to the deceased. A threat to kill one man may not be admissible under an indictment charging the defendant with the murder of, or assault with intent to murder another and different man.—*Ogletree v. State*, 28 Ala. 693. But threats to kill or injure some one not definitely designated, especially when made shortly before the commission of the offense to which they may be construed to have reference, are unquestionably admissible in connection with other explanatory circumstances, and on proof of the *corpus delicti*. The threats of a general character, made the subjects of objection in the record, all come within the influence of the above principle, and were properly admitted. It was a matter of mere inference whether the deceased came within their scope. Their weight or probative force was a question entirely for the jury.—Whart. Hom. § 693; *People v. Scoggins*, 37 Cal. 677; S. C. Cases Self-Def. (Horr. & Thomp.) 596; *Ross v. State*, 62 Ala. 225; Whart. Cr. Ev. § 756; *Redd's case*, 68 Ala. 492.

There was no error in admitting the testimony of the witness, Malloy, to the effect that, an hour or two before the difficulty, the defendant had proposed to exchange knives with him, showing at the time a *small* three-bladed knife, and assigning as a reason that his knife was *too small*. It may have been comparatively weak, but it was clearly relevant as an act of preparation, when taken in connection with the previous difficulty or bad feeling between the parties, and as one link in the chain of circumstances intervening during several hours immediately prior to the killing.

Conceding that the defendant's testimony tended to prove that he was *free from fault* in having brought on himself the necessity of the killing, and that he could not apparently *retreat with safety*, yet there was also other evidence tending to prove the contrary, and all the charges requested bearing on the question of self-defense withdrew from the jury all consideration as to the truth or falsity of this conflicting evidence, and they were for this reason properly refused. These charges assumed the truth of the defendant's version as to these two material aspects of the case, which could not be ignored by the jury in forming their verdict.—*Leonard's case*, 66 Ala. 461; Roscoe's Cr. Ev. (7th ed.) 739; *Cross v. State*, 63 Ala. 40, and other authorities cited in Clark's Cr. Dig. (1881) § 490.

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As to witnesses who are not medical experts, the doctrine is clearly settled in this State, in accordance with the general current of authority, that they may express their opinion, in certain cases, as to the sanity or insanity of one whose state of mind is the subject of investigation. To authorize this, however, it must first be shown that the acquaintance of the witness with the party whose sanity is questioned, is of an intimate character, and his association with him of sufficient duration to justify him in forming a correct judgment as to the intellectual *status* and habits, upon which he seeks to throw the light of his testimony.—*In re Carmichael*, 36 Ala. 514. It is said in our decisions generally that such witnesses, not being experts, should accompany their opinions with the facts upon which they are based; and in *Norris v. State*, 16 Ala. 778, where the witness was introduced to prove the insanity of the prisoner, it was asserted that his opinion “must be preceded by the facts and circumstances upon which it is predicated.”—*Florey v. Florey*, 24 Ala. 241; *Powell v. State*, 25 Ala. 21. This is no doubt the better and safer practice in all cases where opinions are expressed by non-experts affirming the *insanity* of a party. Here the eccentric manifestations and abnormal facts, being affirmative in their nature, can be readily stated in advance, and, constituting the basis of the opinion, may be said to determine its value and weight. But where the witness testifies to the *sanity* of a party, there may be no such abnormal facts to be stated. He may testify to the non-existence of such facts by way of general negation. The competency of the witness, therefore, *in limine*, depends simply upon the fact that he has an acquaintance with the party, whose sanity is questioned, of sufficient duration and intimacy to have afforded him opportunities for such frequent observation, as to justify the formation of a correct opinion as to the question of sanity or insanity.—*Stuckey v. Bellah*, 41 Ala. 700. It was properly observed in *Powell v. State*, 25 Ala. 28, that, “it is impossible to lay down any precise rule as to the length or character of acquaintance which would render the opinion of a witness admissible on this subject.” It must rest, to a considerable extent, within the sound legal discretion of the *nisi prius* court, the value of such opinions being susceptible of easy test through the crucible of cross-examination. These several non-expert witnesses, who were introduced by the State to prove the sanity of the defendant, were in our judgment shown to have been *prima facie* competent.—*Stubbs v. Houston*, 33 Ala. 555; Whart. Cr. Ev. § 417; 1 Redfield on Wills, 141; 1 Russell on Cr. (9th Ed.) 26, note 1; *Pidcock v. Potter*, 68 Penn. St. 342; S. C. 8 Amer. Rep. 181; *Hardy v. Merrill*, 56 N. H. 227; S. C. 22 Amer. Rep. 441; *Stuckey v. Bellah*, 41 Ala. 700, 1 Whart. Law Ev. § 451.

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Where a defendant on his trial elicits irrelevant evidence from his own witness on direct examination, he can not complain that the State is permitted to bring out other irrelevant matter by way of explanation or rebuttal, touching the same subject-matter.—Starkie's Ev. (Sharswood) 201, *note*; *Havis v. Taylor*, 13 Ala. 324; *Findlay v. Pruitt*, 9 Port. 195. Great latitude must necessarily be allowed in the cross-examination of witnesses, and much left to the enlightened discretion of the lower courts, by whom alone the temper, demeanor and prejudices of the witness can be observed and known.—*Marler v. State*, 68 Ala. 580. In view of this principle, and apart from other satisfactory reasons unnecessary to be discussed, there was no objection to the evidence elicited on cross-examination of the witness Cheatham.

We discover no error in the rulings of the City Court, and its judgment is affirmed.

BRICKELL, C. J., *dissenting*.

Royston v. May.

Action on Promissory Note.

1. *Application of payment by creditor*.—When a debtor, owing more than one debt to a creditor, makes a partial payment, but does not direct its application, the creditor may apply it to any of the debts then due, and not barred by the statute of limitations.

2. *Same; when does not interrupt the running of the statute of limitations*.—But when such application is made by the creditor, being the act of the creditor, in which the debtor does not participate, and of which he has no notice, it does not interrupt the running of the statute of limitations upon the debt to which the payment was applied.

APPEAL from Dallas Circuit Court.

Tried before HON. JOHN MOORE.

This was an action of *assumpsit* on a promissory note, brought by Moody H. May against Young L. Royston, and was commenced on 24th June, 1881. Among other defenses, the defendant pleaded the statute of limitations of six years.

The instrument sued on was executed on 13th October, 1874, and, as the evidence tended to show, was given for money loaned by the plaintiff to the defendants. The plaintiff testified on the trial, among other things, that "the defendant Royston, on the 2d May, 1878, paid to him about eighty dollars, without any instructions or directions as to its application; that said

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Royston was at the time indebted to the witness in a large amount on his individual account then due, as well as for the amount sued for; that when said Royston paid said sum of about eighty dollars to witness, witness applied five dollars of it as a payment on the indebtedness sued for, and then entered "a credit on said instrument therefor, and the balance he applied to the individual indebtedness of said Royston, leaving still due thereon "a large balance." This was the substance of the evidence touching this payment and its application.

In the general charge the court instructed the jury, in substance, that if they believed from the evidence that the defendant Royston was indebted to the plaintiff as testified to by him, and that he made a payment to him, but did not give the plaintiff any instructions or directions as to which indebtedness the amount so paid should be applied, then the plaintiff had the right to make the application; and he could apply a part of the amount so paid to the debt sued on, and the remainder to the individual indebtedness of said defendant; and that if they further believed from the evidence that plaintiff applied any portion of the amount so paid, at the time of the payment, to the indebtedness sued on, then the amount so applied would be a valid and legal payment; and the statute of limitations would begin to run from the date of payment, and would not be a bar to this suit until the expiration of six years therefrom. To this charge the appellant excepted, and specially to that portion thereof touching the running of the statute of limitations. The court also gave a charge at the written request of the plaintiff, embodying substantially the same instructions as contained in the general charge, to which the appellant excepted. Other questions are raised, and other facts pertaining to such questions are stated in the record, which are not here set out, because they were not considered by the court.

The trial resulted in a judgment for the plaintiff as against the defendant Royston, but in favor of the defendant Moseley. The rulings above noted are among the assignments of error here made.

SUMTER LEA and WATTS & SONS, for appellant.—(1) "To make a partial payment evidence to stop the statute of limitations, the defendant must intend the payment to be thus applied, or must know, and approve of such application. The charges assumed, without any evidence of such intent, that the defendant did intend that the \$5 paid was on the debt sued on; or that, without any evidence, the defendant knew of such application and approved" it. See *Minneice v. Jeter*, 65 Ala. 222. The charges were, therefore, erroneous. (2) The plaintiff had no right to *split* the sum into two parts, and apply one part to

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the individual indebtedness of Royston, and the other part to the debt sued on.—See *Ayer v. Hawkins*, 19 Vt. 26; *Wheeler v. House*, 27 Vt. 735.

PETTUS & DAWSON and H. S. D. MALLORY, *contra*. (No brief came to the hands of the reporter.)

BRICKELL, C. J.—When a debtor, owing more than one debt to the same creditor, makes a partial payment, not directing its application, the creditor has the election to apply it to either of the debts which may be due, and not within the bar of the statute of limitations.—*Callahan v. Bozeman*, 21 Ala. 236; *Bobe v. Stickney*, 36 Ala. 482; *Robinson v. Allison*, 36 Ala. 525. The right of the creditor to apply the payment, and its effect otherwise than as an extinguishment *pro tanto* of the debt to which it is applied, are different questions. The precise question now presented is, whether such an application, the sole act of the creditor, in which the debtor does not participate, and of which he has no notice, will interrupt the running of the statute of limitations upon the debt to which the payment is applied.

The reason and principle on which a partial payment operates to take a debt without the statute of limitations, is, that by the payment the party making it intends to acknowledge and admit the greater debt to be due; and, as is said in *U. S. v. Wilder*, 13 Wall. 254, “if it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment.” In *Mills v. Fowkes*, 5 Bing. N. C. 455, it was said by TINDAL, C. J., that “in order to have that effect, the payment must expressly be made in discharge of part of a larger debt, which accrued six years or more before the payment.” And ERSKINE, J., said: “In order, by a part payment, to take a case out of the operation of the statute, the payment should be made on account of the particular debt; the reason is, that the payment is taken as an acknowledgment, and, therefore, the intention of the party making it is material.” In *Pond v. Williams*, 1 Gray, 630, SHAW, C. J., said, that a partial payment, to have the effect of interrupting the running, or of removing the bar of the statute, “must be made by the defendant specifically on account of the debt . . . , because it is, by implication, the payment of a part of a larger subsisting debt, and, therefore, it is an admission, a conclusive admission on the part of the debtor, of the actual existence of the balance as a subsisting debt, notwithstanding the lapse of time, and the legal operation of the statute; from this acknowledgment of the defendant the law

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implies a new promise, which prevents the operation of the statute."

It is not a mere payment that interrupts the running of the statute, or removes the bar of the statute when it is complete. The payment must be a partial payment of a debt the debtor recognizes as subsisting, and intends to extinguish in part. If this does not appear, an acknowledgment of an existing liability, and of a willingness to make further payment is not shown; the running of the statute is not interrupted, nor its bar, if complete, removed.—*Brown v. Latham*, 58 N. H. 30; S. C. 42 Am. Rep. 568. Under the present statute, a partial payment merely interrupts the running of the statute—it will not remove the bar of the statute when it has attached. And it must be a payment made "by the party sought to be charged."—Code of 1876, § 3240. It is not open to controversy, that the partial payment now relied upon as an answer to the plea of the statute of limitations, was the act of the creditor, and not of the debtor, who did not participate in, or have any notice of it. While it may have been an act the creditor could do lawfully, the only benefit he could derive from it was the payment partially of the debts to which he appropriated the payment in preference to the satisfaction of other debts. The debtor made no acknowledgment of the existence of the debt now sued upon; it was not in his mind; and the running of the statute could not be arrested by the sole act of the creditor. The Circuit Court erred in the instructions given the jury, and, as this conclusion will most probably be decisive of the case upon another trial, we deem it unnecessary to consider the other assignments of error.

Reversed and remanded.

Maguire v. Board of Revenue and Road Commissioners of Mobile County.

Petition to have set aside and vacated an Assessment of Shares in National Bank for Taxation.

1. *National banks; power to tax shares in for State purposes.*—National banks being the creatures of Congress, and the right of the States to tax anything pertaining to them being wholly derived from the grant made by Congress, the power to tax shares in such banks for State purposes must be accepted with all the conditions and reservations annexed to its exercise.

2. *Taxation of shares in national banks; rulings of Supreme Court of*

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United States conclusive on State courts.—The Supreme Court of the United States has the reserved power of revising, and if need be, of reversing the rulings of the State courts bearing on the exercise by the States of the power to tax shares in national banks; and hence, the decisions of that court on that subject must be adopted and followed by State courts.

3. *Discrimination as to power of the States to tax capital stock of national banks, and shares therein.*—Touching the power conferred by Congress on the States to tax, that body has carefully discriminated between the capital stock of national banks, and the shares in such capital stock; the power to tax the former being withheld from the States, while the power to tax the latter is granted, with stated conditions and reservations.

4. *Taxation of shares in national banks in this State prior to act of December 8th, 1880, not authorized.*—Prior to the passage of the act of December 8th, 1880 (Pamph. Acts, 1880-1, p. 7), there was no statute in this State which authorized the assessment of shares in national banks for taxes.

5. *Taxation of shares in national banks; act of December 8th, 1880, not violative of act of Congress.*—The act of December 8th, 1880, providing "that there shall be levied and collected on the value of each share of every national banking association located within this State, whether held by residents or non-residents, the same rate of taxation as is levied on other moneyed capital, the same to be levied and collected in the county where each such association is located, and not elsewhere, and to be paid by each such association for the shareholders thereof," is not rendered violative of the restrictions placed by the act of Congress on the power of the States to tax shares in such associations, by reason of subdivision 8 of section 362 of the Code of 1876, which provides only for the taxation of the excess of "all money loaned and solvent credits or credits of value," after deducting the tax-payer's indebtedness; but the language of the act, construed in connection with the above provision of the Code, allows and authorizes a deduction by the shareholder of his debts from the value of the shares owned by him, because the privilege of such deduction is allowed in the taxation of money loaned, and solvent credits or credits of value.

6. *Same.*—Nor is the provision of the act of December 8th, 1880, requiring the taxes on such shares to be paid by the bank for the shareholders, violative of the act of Congress.

7. *Same; not affected by subd. 10 of section 362 of Code.*—Subdivision 10 of section 362 of the Code, which declares that the capital stock of domestic corporations, except such portion thereof as may be invested in, and otherwise taxed as, property, shall be subject to taxation, having no reference to the taxation of shares in the capital stock of such corporations, is not violative of the act of Congress restricting the power of the States to tax shares in national banks, as an unfriendly discrimination against such shares; nor is an assessment of such shares under the act of December 8th, 1880, thereby rendered invalid, because, in making the assessment, no deduction was allowed the shareholders for or on account of taxes paid by the bank on real estate or other property owned by it, and assessed for taxation.

8. *Same; 2nd section of act of December 8th, 1880, unconstitutional.* No legislative attempt having been made prior to the passage of the act of December 8th, 1880, to tax the shares of national banking associations, the second section of that act, providing that "there shall be assessed and collected in any county where such association is located, upon each share of the capital stock of such association which has escaped taxation for any preceding year since 1874, the same rate of taxation, State and county, as was in each year assessed and collected upon other moneyed capital," is violative of sections 4 and 5 of article xi of

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the constitution, limiting the rate of taxation in any one year for State and county purposes.

9. *Distinction between levy and assessment of taxes; constitutional inhibition applies to former, not to latter.*—The constitutional inhibition is against levying taxes, a legislative function, and not against assessing taxes, the work of the assessor; and hence, the constitution does not inhibit the assessment and collection of taxes which have been levied, but which have escaped the assessor, or, by reason of defective machinery, could not be collected. But when the legislature declares a new subject of taxation, not theretofore taxed, or attempted to be taxed, and levies a tax upon it, which, in the aggregate, transcends the constitutional limit, calling it a tax for past years can not heal the infirmity.

10. *Section 4 of article xi of constitution, limiting rate of taxation; when statute not within inhibition.*—Section 4 of article xi. of the constitution was not intended to prohibit the enactment of a statute which should operate from year to year until altered or repealed, as the legislative function may be performed in one year, to be operative for successive years; but its meaning is, that a greater burdep than three-fourths of one per cent. shall not be levied or imposed in and for one year.

APPEAL from Mobile Circuit Court.

Tried before Hon. WILLIAM E. CLARKE.

The tax assessor of Mobile county, on 1st August, 1881, assessed, and returned for taxation to the judge of probate, for each of the years 1878, 1879, 1880 and 1881, forty shares of the capital stock of the National Commercial Bank of Mobile, a corporation organized as a national banking association under the acts of Congress providing for the organization of such associations, which belonged to the appellant; and also the shares of said stock belonging to other shareholders. These shares were assessed at par, without any deductions for or on account of any indebtedness which the shareholders owed. At the August term, 1881, of the Board of Revenue and Road Commissioners of Mobile county, "sitting as the Court of County Commissioners for said county, and, by special act of the General Assembly, vested with all the powers and duties of said court," the appellant and the other shareholders filed with said board their petition, praying, for causes therein stated, that said several assessments be set aside as illegal and unauthorized, or, if that relief be not granted, to correct certain alleged errors therein. On the hearing said board ascertained the true value of the shares for each of said years, which was less than par, and corrected the assessments by substituting the value thus ascertained for the value returned by the assessor. The board also further corrected said assessments by deducting from each of them a sum equal in amount to the excess of the indebtedness of the several shareholders over and above their respective solvent credits or credits of value. As to the assessment against the appellant, these were the only corrections made by said board; and, as corrected, this assessment was allowed to stand. It was shown on the hearing that the said bank during said

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years owned certain real estate which had been assessed for State and county taxes, and said taxes had been by it paid. It was further shown that \$6,000 of the capital stock of said bank was during said years invested in bonds of this State, and \$300,000 of said stock was in bonds of the United States. But the board refused to allow any deductions on said assessments on account of these matters.

The proceedings of said board touching the assessment against the appellant were brought by him into the Circuit Court by *certiorari*; and on the hearing that court affirmed the action and proceedings of said board, except as to the assessment for 1879 for county purposes, which was, for reasons not necessary to be here stated, set aside and held for naught. From that judgment this appeal was taken; and it is the basis of the assignments of error here made.

J. LITTLE SMITH, for appellant. (1) It is now well settled that the limitation on the rate of taxation provided by § 5219, U. S. Rev. Statutes, relates not only to the rate *per cent.* laid on valuation, but to the entire system or process of taxation, and prohibits an exaction from the owners of shares of national banking associations, of a larger sum or amount of taxation, in proportion to the actual value of such shares, than is exacted from the individual owners of other moneyed capital in the State, valued in like manner.—*Pelton v. The Bank*, 101 U. S. 146; *People v. Weaver*, 100 U. S. 539; *Pollard v. State*, 65 Ala. 635. Such shares must, under the general law, be valued at their fair market or selling value, and without any deductions, just as all other personal property is valued, where no deduction is specifically allowed or required respecting the property to be assessed for valuation.—Code of 1876, § 371. When any deductions are authorized, under the system of taxation in this State, they are expressly named, and the particular kinds of property, in the valuation of which such deductions must be allowed, are specifically named.—Code of 1876, § 362, subd. 8, 10; *Ib.* §§ 358–9. It is shown by § 360 of the Code that the taxation of “money loaned and solvent credits or credits of value” is not according to the *general rule*, but is subject to *special legislation*. It follows, therefore, that the act of December 8th, 1880, under which the assessment purports to have been made, does not comply with the requirements of § 5219 of U. S. Rev. Statutes, any better than did the act which was held invalid for want of conformity with that statute in *Pollard v. State*, *ex rel.* 65 Ala. 635. It is true that act declares that the tax to be levied on the value of the shares of national banking associations shall be “the same rate of taxation as is levied on

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other moneyed capital ;” but this does not relieve it of the objectionable discrimination complained of. For it lays such rate on the valuation of the shares, and leaves the valuation to be made under the general rule, and not under the special rule provided for the valuation of money and credits. It, therefore, in its effect, operates an unauthorized discrimination against money invested in such shares. Moreover, the language of the act which was condemned for said cause in the case of *People v. Weaver*, 100 U. S. 540, is exactly the same as that used in the act under consideration. (2) But it is insisted that, even if the foregoing propositions be correct, still the appellant can not raise the question of the invalidity of the act, and of the taxation, for the cause last stated, because he did not show that he had debts to be deducted from the valuation of his shares, under the decision in case of *Supervisors of Albany v. Stanley*, 105 U. S. 305. Of course, it is for this court to determine whether, after having so carefully, and so recently reviewed its decisions on this subject, it will now overrule that decision upon such attempted fine-spun distinctions as that case is made to turn on. (3) The National Commercial Bank of Mobile owned and paid taxes on real estate each year for which the assessment was made, valued at \$19,290, and no consideration of that was had in said assessment and taxation. The act of December 8th, 1880, makes no provision by which the holders of the shares taxed could get the deduction or benefit paid on such real estate ; but the shareholders of stock in corporations of the State do get the benefit of taxes paid on real estate owned by such corporations. *Pollard v. State*, 65 Ala. 635, and cases there cited. But it is insisted by the appellees, that this court did not sufficiently discriminate in that case between capital stock and the shares of capital stock. The cases cited in that case show that the court did not overlook that matter. Besides, the question to be borne in mind is, does the whole system or process of taxation discriminate unfavorably against capital invested in national bank stock ; and this mode of taxation, the court clearly shows, does so operate. It will be noticed that sub-division 10, § 362, and subdivision 9, § 358 of the Code impose restrictions against taxation on the shares of State corporations, which are not provided in the case of shares of national banking associations. It must also be noted that subdivision 9 of § 358 is not an absolute exemption of the shares mentioned in it from taxation, but only when the corporation whose shares are so provided for, lists its property for taxation. That is, it is a provision to avoid double taxation, which is not made in case of national banking associations, and their shareholders. If, then, the language of the act of December 8th, 1880, be construed to authorize the deduction, still there was error in

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the action of the courts below; for they refused said tax-payers the benefit of the amount paid by the bank on its real estate. (4) As to the operation of the second section of the act of December 8th, 1880. Prior to the date of the act, there was certainly no law in this State which authorized the taxation of shares of national banking associations.—*Pollard v. State, supra*. The act was enacted before that decision was made, and this section was manifestly written upon a different idea. As there was no law which authorized such taxation, it is difficult to understand how property escaped taxation, when no law imposed any tax on it. It is also difficult to see how any act of the General Assembly can constitutionally authorize the levy, as is done in the act under consideration, *in any one year*, of about six or eight times the rate of tax, which, *in such year*, is levied on other property.—Cons. Art. XI, §§ 4, 5, 7; Code, p. 145. It is repeated *three* several times in these sections, that there is “no power to levy, *in any one year*, a greater rate of taxation than three-fourths of one *per centum* on the value of property within this State.” The limitation is against the power to levy *in any one year* a greater rate, etc.; against the power to levy beyond the rate named *in any one year*. It is not a limitation to tax an excess over the rate named *for any one year*; but it is clearly stated to be a limitation to tax beyond the rate *in any one year*. The statute under consideration does not simply authorize the exercise of an existing power, but attempts to authorize the assessment and collection, in 1881, of taxes for 1878, 1879 and 1880, which were never laid in those years by any valid law; the levy and collection of a tax for four years and greatly beyond the constitutional limit. This can not be constitutional. (5) All the cases referred to by the appellee providing for the collection of back taxes, are cases where there had been a levy under some valid law, but the tax had not been collected by reason of some informality, or error of the officers in the assessment under such levy, whereby the property so taxed for the preceding time had escaped taxation imposed on it by some valid law, or where there was some obstacle arising from some intervening legislation, which had substantially been pronounced invalid, after which there had been subsequent legislation to correct the evils arising out of the erroneous construction of the law which interposed the obstacle. In each case, however, the law which levied the tax was full and complete to levy and collect the tax, and the subsequent law, which came to aid in the collection of the tax, was simply to remove the obstructions in the way of arriving at the right construction and application of such complete law. Therefore, the cases furnish no analogies in the case of an act so framed as to be defective in this: That it wanted

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power to tax at all. The act of 1880 does not aid, but imposes the tax. (6) It is further contended that the nullity of the act is still more apparent, when its provisions for the assessment and collection of taxes for county purposes, for the back years named, are considered; and this point discussed.

WM. G. JONES, *contra*, for Mobile County. (1) All presumptions are in favor of the validity of the act under consideration—act of December 8th, 1880. If its language is so general or obscure that it is reasonably susceptible of two constructions, one of which would render it unconstitutional and void, and the other would render it constitutional and valid, the court is bound to give it that construction which would render it constitutional and valid. In passing this act the legislature must be presumed to have known what was our then existing statute law on this subject—what was the United States statute, and the decisions which had been previously made upon it by our Supreme Court, and the Supreme Court of the United States. The latter court had decided, in *People v. Weaver*, 100 U. S. 539, that a State statute which *refused* to a stockholder in a national bank “the same deduction for debts due by him from the valuation of his shares of national bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the act of Congress”; and our Supreme Court had, in *Sumter County v. National Bank of Gainesville*, 62 Ala. 464, held that subdivision 7 of § 369 of the Code was unconstitutional. With these lights before it, the legislature could not have *intended* to pass an act which would be in conflict with the United States statute. Not only from this consideration, but from the language of the act, it is clear that, in passing the act of December 8th, 1880, the legislature intended by it, taking it in connection with the provisions of our Code, to make our law consistent with the act of Congress, as construed in *People v. Weaver*, *supra*. If it has failed to do so, it must be from ignorance, or want of skill, neither of which will be presumed. (2) Construction of act of December 8th, 1880. The first section of the act, following exactly the words of the act of Congress, levies on the value of each share of national bank stock “the same rate as is levied on other moneyed capital.” Looking to our Code, as we must do, to find what is the rate, though we can not find “moneyed capital” mentioned *eo nomine*, we do find a rate of taxation levied on “all money loaned and solvent credits or credits of value.”—Subd. 8, § 362 of Code. These, in common parlance, are *moneyed capital*, and are held, in many adjudged cases, to be *moneyed capital*, within the meaning of that term as used in the act of Congress. This then is the *rate* manifestly referred to in the act of December 8th, 1880.

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This, too, is the rate most favorable to the stockholder; for it allows him to deduct his indebtedness from the value of his stock, and be taxed on the surplus, and no other clause allows this. This construction was adopted in the courts below, and the deduction allowed. So construed, the act harmonizes our law with the act of Congress, and does not come within the decision in *People v. Weaver, supra*, as shown by the decision in *Supervisors v. Stanley*, 105 U. S. 305. (3) The decision of this court in *Pollard v. State, ex rel.*, 65 Ala. 628, was avowedly made on the authority of the then recent decision in *People v. Weaver, supra*; and on the idea that the U. S. Supreme Court in that case decided the New York statute then in question to be unconstitutional and void. But it now appears from the later decision in *Supervisors v. Stanley, supra*, that such was not the decision. This latter case decides that the New York statute is not wholly void, and sustains assessments made under the same statute which was under consideration in *People v. Weaver, supra*, in all cases where the stockholder had failed to claim his right of deduction in due time. This last case is very strong, if not absolute authority, in favor of the appellee in this case. (4) The proper construction of the act of Congress has been frequently considered by the Supreme Court of the United States, and by other courts. It appears to be now well settled that it was not the intention, or effect of the act of Congress to curtail the power of the States on the subject of taxation, or to prohibit the exemption of particular kinds of property; that a State tax law is not violative of the act of Congress merely on the ground, that it allowed a partial exemption of a certain kind of *moneyed* capital; nor because *some moneyed* capital was exempted; and that it is a sufficient compliance with the act of Congress, if the rate of State taxation is the same, or not greater than on the *moneyed* capital of *individual* citizens *which is subject or liable to taxation*.—*People v. Commissioners*, 4 Wall. 244; *Hepburn v. School Directors*, 23 Wall. 485; *Adams v. Nashville*, 95 U. S. 19; *Everitt's Appeal*, 71 Penn. St. 216. These cases are cited with approval in *Pollard v. The State, ex rel., supra*; and they sustain the validity of the act of December 8th, 1880, and furnish an answer to all objections taken against the act, so far, at least, as the first section of the act is concerned. (5) Construction of second section of the act of December 8th, 1880. It is contended for the appellant that, prior to the passage of this act, there was no valid law in this State levying any tax on shares of stock in national banks, and, therefore, it can not be said with propriety that they had *escaped* taxation during the years preceding the enactment of the statute. It is, however, insisted for the appellee, that our prior

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legislation furnishes a good and sufficient answer to this objection. No *special* provision for the taxation of such shares in our revenue laws prior to the passage of the act of February 27th, 1875 (Code, Subd. 7 of § 369), is now remembered. But under the revenue act of 1868, and succeeding revenue statutes, such shares were held to be taxable under the general description of property. This was decided in *McIver v. Robinson*, 53 Ala. 456, and again, in 1878 and 1879, in the Sumter county cases. So stood our statutes and decisions when the act of December 8th, 1880, was passed. The second section of the act was intended to be *remedial* by providing a better mode of assessing and collecting escaped taxes, imposed by the pre-existing laws. This the legislature might constitutionally and properly do. Cooley on Tax., ch. X, pp. 223-4. The decision in the case of *Pollard v. The State*, *supra*, was made subsequent to the passage of this act, and can have no bearing on the question of the intention of the legislature in passing the act. That decision was made, as now appears, under a misapprehension as to what was the decision of the Supreme Court of the United States in *People v. Weaver*, *supra*. It practically nullified a provision of our revenue laws, so far as concerns shares of stock in national banks, which had been acted on for more than ten years, and that with the sanction of this court; and it overrules, to some extent, four recent and well considered decisions of this court. Under such circumstances we may, without any disrespect, ask this court to reconsider that decision. (6) If, however, the second section of said act is and was intended to be retrospective, so as to subject to taxation for the years from 1875 to 1880, inclusive, property as to which no *valid assessments* of taxes could be made during those years, we insist that the section is not void on that ground. Our legislature has plenary legislative power, except so far as it is limited by some restriction in the constitution of the United States or in that of this State. We know of no provision of either which prevents the legislature from passing such a retrospective law.

GAYLORD B. CLARK, *contra*, for the State.—(1) The act from which section 5219 of Revised Statutes of the United States is taken, was passed June 3d, 1864. It authorized the tax of the *shares* of national banking associations as the property of the individual shareholders, and also the taxation of real estate as the property of the corporation. As it was originally enacted, it contained two restrictions upon the power to tax the shares: (1) That the rate should not be greater than that assessed upon moneyed capital of the individual citizen; and (2) that there should be no discrimination in favor of the shares of State banks. Under the operation of this act the following

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cases were decided: *Van Allen v. The Assessors*, 3 Wall. 573; *The People v. The Commissioners*, 4 Wall. 244; *National Bank v. Commonwealth of Kentucky*, 9 Wall. 353; *Lionberger v. Rouse*, 9 Wall. 468. These authorities and the statutes thereby construed discussed. (2) But on the 10th of February, 1868, Congress passed an act on the subject of taxing shares in national banks, which had the effect of amending section 41 of the act of 1864, by striking out the second restriction placed on the taxing power of the States. Where a change of this sort is made in a statute, it is presumed to be made *ex industria*, and for a purpose. What is that purpose, and what is the effect of the change? The proviso operated as a restriction on a broad power of taxation given to the States in the first part of this section; the repeal of the proviso was a withdrawal of such limitation or restriction on the exercise of the power, and is equivalent to an express enactment of the converse of the proposition stated in the proviso. This is clearly recognized in the case of *Lionberger v. Rouse*, *supra*. As said in that case, the power of the States to tax shares of national banks is now "*subject only* to the restriction, that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of *individual citizens*." These words, *individual citizens*, exclude, as far as words can, any idea of the application of the first, and now only restriction to moneyed capital in the hands of corporations. (3) Not only is the restriction confined to the rate charged on moneyed capital in the hands of the individual citizen; but it is clear that, as the law now stands, the *exemption* of *any* class of moneyed capital from taxation is not a violation of the restriction of the act of Congress. The restriction is, that when moneyed capital of any class is taxed as such, the shares of national banks shall bear no greater rate.—See *National Bank v. Commonwealth*, *supra*; *Hephurn v. The School Directors*, 23 Wall. 480, 485; *Adams v. Nashville*, 95 U. S. 19. A conclusion from these decisions is, that the States may entirely exempt any particular class of moneyed capital from taxation, and of course, as to such exempted capital, any rate whatever on the shares of national banks would be in excess; but the law has no reference to that; it merely confines itself to a comparison of the rate imposed on national bank shares with the rate which may be actually imposed on other portions or classes of moneyed capital, which is actually taxed as the property of individuals. (4) Applying these principles to the statutes of this State now in force, and applicable in their terms and operation to the subject-matter, we think it can be plainly made to appear that the appellant has secured a judgment more favorable than he was entitled to. There is no express restriction in the act of De-

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cember 8th, 1880, of which appellant can complain. The law, therefore, is not void. The only questions are: First, can it be so practically applied under the general law governing taxation, as to be operative, and not work an actual discrimination against the appellant; and, second, has it been so applied in this case. The statute does not fix the rate in terms, but we insist that it does properly fix it by reference—*certum est quod certum reddi potest*. It certainly fixes the same rate as that imposed on other moneyed capital. To say that we can not ascertain from the law with certainty what the rate imposed on moneyed capital is, is to say that all existing laws attempting to impose such tax on any or all moneyed capital are void for uncertainty. But this is not contended for, although it follows as a legal sequence from the argument made by appellant's counsel. By section 368 of the Code, and the acts amendatory thereof, a uniform rate is provided, which operates uniformly on all property *assessed*, or liable to taxation. By both the constitution and the statutes this rate is to be assessed on the actual value; and such also is the provision of the act of December 8th, 1880. In subdivisions 7, 8, 9 and 11 of § 362 of the Code, a tax is levied on designated species of moneyed capital of individuals; and as far as any subject is taxed at all, the rate is the same as that allowed to the national bank shareholder. By subd. 9 of § 358 of the Code all shares of the capital stock of any corporation, which is required to list its property for taxation, are entirely *exempted from all taxation* whatever, and can not be assessed *against the shareholders* of such corporations. This total exemption of the shares as such is a *total exemption* of a portion of the moneyed capital held by the individual citizen; and is such an exemption as can properly be allowed under the influence of the cases before referred to. It is identical in principle with the case of *The People v. Commissioners*, 4 Wall. 244. There is also exempted by subd. 7 of § 362 of the Code, money held subject to draft in the prosecution of a regular exchange business; and by subdivision 9 of the same section, money employed or invested as therein stated is also wholly exempted, if otherwise taxed as capital. These are neither deductions nor abatements of a tax levied, but are exemptions from all taxes of that class of moneyed capital in the hands of the individual, provided the *individual* shall have it assessed as capital. But no provision is made in the Code for the taxation of such moneyed investments in the *individual as capital*; and hence, as to this it is only an apparent exemption. If, however, the money so employed or held should belong to a *corporation*, it might operate as an exemption by virtue of subdivision 10. But the inhibition is not *now* against a discrimination favorable to *cor-*

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porate moneyed capital, or has it ever been against discrimination, when brought about by a total exemption from taxation. (5) The case of *Pollard v. State, ex rel.* 65 Ala. 628, cited and commented on; and it was contended that this court misapprehended the effect of the decision in the case of *The People v. Weaver*, 100 U. S. 539, as shown by the subsequent case of *Supervisors of Albany v. Stanley*, 105 U. S. 305; and further that neither of these cases in any way modified the former cases hereinbefore cited, which permit exemptions of a portion of moneyed capital from taxation altogether. It was further contended that the case made by the record in this cause was clearly within the rulings in *Hills v. The Exchange Bank*, 105 U. S. 314; and *Evansville Bank v. Britton*, *Id.* 322. (6) As to the real estate of national banks being taxed, as the property of the banks, without allowance to the shareholders on account thereof, we find an express authority for such seeming double taxation in the enabling act of Congress. It is true that when the *capital* of a State bank or other corporation is taxed, such portion of such capital as is listed and taxed as property, is deducted from the value of such corporate capital.—Code, § 362, subd. 10. But this is not an illegal discrimination against the shareholders of national banks, nor against the capital stock of such banks; because the restriction of Congress does not apply to the case, and because there is no tax at all on the *capital of national banks*, as to which a comparison could be drawn. We think, therefore, that the reasoning in *Pollard v. State, ex rel.*, *supra*, went further than was contemplated by the decisions of the U. S. Supreme Court and the statute which they construed. (7) In this case every shareholder who proved the existence of debts above his solvent credits was allowed such deductions; and hence, on that score, he has no cause of complaint. We hope the court will pass upon the question as to whether the shareholders are entitled to the deductions actually allowed, although no cross appeal was taken; not, of course, to operate on the judgment in this case, but as a guide for the future. That the machinery of our law is adequately certain to protect against any improper valuation, is shown by the record in this case, where the assessor's valuation was reduced to the actual market value. No such discrimination is shown, either in the operation of the law, or conduct of the officers making the assessments, as vitiates the judgment of the court below, under the principles decided in the case of *Pelton v. The National Bank*, 101 U. S. p. 143.

STONE, J.—The authority to tax shares in national banking associations for State purposes, is uniformly held to be de-

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rived from the act of Congress, which confers the power. Rev. Stat. U. S. § 5219; *Pollard v. State*, *ex rel.* 65 Ala. 628; *Farmers' National Bank v. Dearing*, 91 U. S. 29. Without such statutory concession, no such tax could be levied. The power is conferred, not in general terms, but with limitations. The language is, that nothing in the laws of Congress "shall prevent all the shares of any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." The leading policy of these restrictions can not be misunderstood. The first was intended to prevent unfriendly, discriminating assessments against investments in the stock of national banking associations, lest thereby such investments should be discouraged and hindered by excessive burdens. Hence, the burden should be no greater than that levied by the State on other moneyed capital in the hands of individual citizens. You may tax the shares, said Congress, for the support of your government, which protects them in common with all other material interests, but you can not lay upon them heavier burdens than you lay on other moneyed capital. The act discriminates carefully between the capital stock of such banking associations, and the shares in such capital stock. "The tax on the shares," as said by Justice NELSON in *Van Allen v. The Assessors*, 3 Wall. 583-4, "is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This

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is a distinct, independent interest or property, held by the shareholder, like any other property that may belong to him." Speaking of the difference between the shares and the capital stock, we, in *Sumter County v. National Bank*, 62 Ala. 464, said: "It is the difference between the several parts and the whole; between the tributaries and the congregated volume which forms the river; . . . between an artificial entity, called a corporation, having a local habitation and a name, capable of suing and being sued, and which may survive all the shareholders of any given period, and the several owners of the shares, who are commonly real persons, and who may undergo constant change by transfer or death, without disturbing or affecting the continuance or identity of the corporation."

National banking associations, being the creatures of Congress, and owing their legal existence to that body; and the right of the States to tax any thing pertaining to them being derived from the grant made by Congress, it follows logically and legally that we must accept the power, with all the conditions and reservations they have annexed to its exercise. And it equally follows, and such are its uniform rulings, that the Supreme Court of the United States has the reserved power, in *dernier resort*, of revising, and, if need be, of reversing the rulings of the State courts, bearing on the exercise of this power by the States. The question of the restriction imposed by Congress, that State taxation on the shares of national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," has led to much contention, and, to our apprehension, somewhat varied rulings in that court of last resort.—See *Van Allen v. The Assessors*, 3 Wall. 573; *People v. Commissioners*, 4 Wall. 244; *National Bank v. Commonwealth*, 9 Wall. 353; *Hepburn v. School Directors*, 23 Wall. 480; *Adams v. Nashville*, 95 U. S. 19; *People v. Weaver*, 100 U. S. 539; *Pelton v. National Bank*, 101 U. S. 143; *Cummings v. National Bank*, *Ib.* 153; *Supervisors v. Stanley*, 105 U. S. 305; *Hills v. Exchange Bank*, *Ib.* 319; *Evansville Bank v. Britton*, *Ib.* 322.

Until the enactment of the statute approved December 8, 1880.—Pamph. Acts, 7—there was no express provision in our statutes for taxing the shares of national banks. We had provision for taxing the capital stock of incorporated companies.—Code of 1876, § 362, subd. 10. This did not affect national banks, for Congress had not granted power to the States to tax the capital stock of such associations. Our revenue system had also levied a tax on all other property, real and personal, not otherwise specified therein.—Same section, subd. 13. Under the clause last cited, attempts were made to assess and collect taxes on the shares of national banking associations.

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Some of our earlier rulings maintained such assessment and collection, while we steadily declared that all attempts to tax the capital stock of such associations was forbidden by law. *National Com. Bank v. Mayor*, 62 Ala. 284; *Sumter County v. National Bank*, *Id.* 464. In *Pollard v. State, ex rel.* 65 Ala. 628, the question was again presented of the power to tax the shares of national banking associations under subd. 13 of section 362, *supra*; and, overruling our former decisions, we held that that statutory provision did not authorize the assessment. The effect of that ruling was that until December, 8th, 1880, there was no statute in this State which authorized the assessment of shares in national banks for taxes. We added: "Whether the recent act is so framed as to harmonize existing provisions of the Code with the requirements of section 5219 of the United States Revised Statutes, is a question which is not necessarily presented by the record, and is, therefore, left undecided in this case."

The decision in the case of *Pollard v. State, ex rel.*, *supra*, was rendered by this court, soon after the publication of the ruling of the U. S. Supreme Court in *People v. Weaver*, 100 U. S. 539, and conformed to that ruling. There was then no later decision of that court, bearing on that question, and we had no option but to follow it. But, if the question were left to our own uncontrolled and unaided judgment, we think we correctly ruled that our former statutes did not justify the assessment we therein pronounced invalid. The case of *People v. Weaver* arose under New York statutes. Before the national banks were authorized, it had been enacted in New York that tax-payers should be allowed a credit of the amount of their just debts from the sum of their taxable property, and should be assessed for taxes only on the excess. The statute also provided how the tax-payer's indebtedness was to be made known. The result was, that taxes were assessed and collected only on the net value of the tax-payer's estate—what he would be really worth, after paying his debts. In 1866 the legislature of that State provided that the shares of all banks, State and National, should be assessed and taxed at their value. This statute is confined in its terms to shares of stock in banks, and makes no mention of any indebtedness of the tax-payer to be deducted. Williams, a tax-payer, whose shares in a national bank had been assessed, appeared before the board of assessors, and claimed a deduction of the sum of his indebtedness from the value of his bank shares. He submitted his affidavit, in the form the older statute had required. The credit claimed was disallowed by the assessors; they holding that the later statute made no provision for such discount or deduction, but properly construed, denied such deduction. And the courts of

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New York confirmed their ruling. The case was then appealed to the Supreme Court of the United States. The judgment of the Court of Errors of New York was there reversed by a unanimous ruling of the court, Justice MILLER delivering the opinion. Among other things, he said: "The statute of New York, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him, from the valuation of his shares of national bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the act of Congress." This appeal, it will be observed, raised the question, and only the question of Williams' liability on the assessment of his shares of stock in the national bank. Speaking of the said statutes of New York, the United States Supreme Court, in the later case of *Supervisors v. Stanley*, 105 U. S. 305, made emphatic what had been implied in their former ruling, that they were not entirely inoperative. They were only inoperative to the extent they actually taxed national bank shares at a greater rate than was assessed by the State on other moneyed capital. One question raised in the case of the *Supervisors v. Stanley* arose on the identical claim of Williams to have a discount of his debts, which had been ruled on in the case of *People v. Weaver*. The case of Stanley, however, involved the liability of other shareholders to taxation, who were not shown to have any debts to be discounted from the value of their taxable property. The majority of the court held that this latter class had no cause of complaint against the New York statutes, or their construction by their Court of Appeals, because "the denial of this right [deduction of indebtedness] does not affect him [the shareholder]. He pays the same amount of tax that he would if the law gave him the right of deduction."

In the case of *Evansville Bank v. Britton*, 105 U. S. 322, the question arose under the revenue system of Indiana. This statute allowed a credit to the tax-payer of the amount of his indebtedness from two named classes of taxable values: 1. Credits or money at interest, either within or without the State, at par value. 2. All other demands against persons or bodies corporate, either within or without the State." From all other subjects of taxation, no deduction of indebtedness was allowed. The court made the same ruling in that as in the *Stanley case*, namely: That when no deduction was allowed the tax-payer for his indebtedness, the tax on national bank shares was invalid. It was repeated, however, that this principle would not apply to those shareholders, who failed to show they owed debts, which they claimed the right to have deducted.

The foregoing are the latest rulings of the Supreme Court of the United States on this question, that have come to our

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knowledge. It will be seen that the validity of State taxation on national bank shares is made by them to depend, not so much on the frame of the State law which levies it, as it does on the operation of the statute on the individual tax-payer. In other words, unless the tax-payer is himself subjected to a greater rate of taxation on his bank shares, than he is on his other moneyed capital, then the State law is valid as to him, although as to other shareholders in the same bank it is invalid, because it denies to them discounts from the value of their shares, which it accords to them in the taxation of their other moneyed capital. We submit if this ruling does not give to statutes, similar to those brought to view in the cases of *Stanley* and *Britton*, *supra*, a very unequal, if not an oppressive operation. It requires, under one and the same statute, a payment of taxes on all shares of stock held by one class, and relieves from taxation shares held by others, because, forsooth, they owed debts, and the law makes no provision for a deduction of the amount of the tax-payer's indebtedness. And this, notwithstanding the debts for which deduction is claimed, do not, in amount, equal one-half, or even one-tenth of the value of the bank-shares held by such tax-payer. This will certainly give to a State statute an unequal operation, which its framers never could have contemplated. Justice BRADLEY, dissenting, said: "It [the statute] is void, in my judgment, because it makes no exception, but is general in its terms, subjecting to taxation the capital stock [shares of?] of national banks, without the privilege of deducting debts. Denying to it operation and effect as to those who desire to claim the benefit of the deduction, and giving it effect as to all others, is to tear a portion of the law out by the roots." In our opinion Justice BRADLEY's opinion is the sounder; and if, in the interpretation of our statute, we come to the conclusion that it is invalid because it makes no provision for proper deductions, we will hold it invalid *in toto*. Suppose a State statute should enact that shareholders in national banking associations who owe no debts, shall pay a tax thereon at their market value, at the same rate as that levied on lands and personal property; but if the shareholder owe debts, his shares shall not be taxed. Such tax might not be a direct violation of the enabling act of Congress. Could it be upheld in this State? We apprehend not.—Const. of Ala. Art. 11, § 6; *Mayor v. Stonewall Ins. Co.* 53 Ala. 570.

By the act which became a law December 8, 1880—Pamph. Acts, 7—it was provided: "That there shall be levied and collected on the value of each share of every national banking association located within this State, whether held by residents or non-residents of the State, the same rate of taxation as is levied on other moneyed capital, the same to be levied and collected

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in the county where each such association is located and not elsewhere, and to be paid by each such association for the shareholders thereof." This statute, it will be observed, conforms to the second of the two restrictions imposed by the enabling act of Congress. It is also within permitted bounds when it requires the tax to be paid by the bank for the shareholders.—*National Bank v. Commonwealth*, 9 Wall. 353. It is contended for appellant that the statute is invalid, because it makes no provision for deducting the tax-payer's indebtedness from the value of his shares, and taxing him only on the balance. Part of this argument, if not the whole, rests on the language of our statute, which declares and defines the subjects of taxation. One class of such subjects is expressed in this language (Code of 1876, § 362, subd. 8): "All money loaned and solvent credits or credits of value, from which credits the indebtedness of the tax-payer shall be deducted, and the excess only shall be taxed." In the case in hand, the shareholders were allowed a credit against the value of the shares, of the amount of their debts; and under the rule declared in *Supervisors v. Stanley*, and *Evansville Bank v. Britton*, *supra*, the assessment complained of in this case would be upheld, if carried to the Supreme Court of the United States. This meets the first of the restrictions imposed by the act of Congress; for the taxation was not at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State. Our statute is not materially distinguishable from that of Indiana on the subject of deductions; and if the sum of the tax-payer's indebtedness had been allowed to be deducted in *Evansville Bank v. Britton*, and the excess only had been taxed, there is nothing stated in the opinions to show that such assessment would not have been pronounced free from error. The reasoning of the court clearly shows that such assessment would have been maintained, for the tax-payer would then have had secured to him all the act of Congress requires.

It is argued, however, that our statute makes no provision for such deduction, and therefore the assessment must fall, being without the law. Can this be maintained? It is our duty to so construe the language of the act as to uphold it, if its language, reasonably interpreted, will admit of it. The act of Congress, imposing the restriction we have been commenting on, had been on the public statute book for many years. Our own statute, providing for a deduction of the tax-payer's debts from the sum of his money loaned and solvent credits, and taxing only the balance, had also been long in force. Money loaned and solvent credits are clearly moneyed capital, and probably constitute the most valuable part of what may properly be classed, in common parlance, as moneyed capital. *Peo-*

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ple v. Weaver had been decided at the term—possibly a year—preceding our enactment of December 8, 1880. Is it improbable that our legislature had in view this ruling of the United States Supreme Court? They certainly had the act of Congress in contemplation. The language of the act proves that. And did they not also consider its construction? We think we do no violence to the language of the statute when we hold, as we do, that it allows a deduction of the tax-payer's debts, because another and very valuable class of moneyed capital, under our system, enjoys the privilege of such deduction. We tax such bank-shares, as we do other, and the most favored moneyed capital.

Inasmuch as our revenue system allows a deduction of the tax-payer's debts from only one class of taxable subjects—money loaned and solvent credits—our own unaided judgment would possibly lead to the conclusion, that bank-shares, being an entirely different species of property, could not claim such deduction. What is the proper import of the words, "other moneyed capital," in the act of Congress? It certainly declares that shares in national banks are moneyed capital. The word *other* proves that. Does not this prove that Congress had in contemplation moneyed capital of like kind, or similarly invested? Now, from other moneyed capital of like kind, our statute, and, it would seem, the statute of Indiana, allows no deduction on account of debts of the tax-payer. But the ruling in *Evansville Bank v. Britton*, leaves this question not an open one. We conform our rulings to that decision.

Another objection to the validity of the present assessment is based on subdivision 10, section 362 of our Code, which enacts that "the capital stock of all incorporated companies created under any law of the State, whether general or special, except such portion of the capital stock as may be invested in property, and taxed otherwise as property, shall be subject to taxation." The argument is, that because of this discount from the taxable value of other investments in corporations, and which was not allowed in this case, this is a violation of the first restriction imposed by the act of Congress. We answer this objection as follows: The difference between the capital stock of a corporation and the shares of stock in that corporation is well marked, and perhaps is nowhere more clearly shown than in the opinion of Mr. Justice NELSON in the case of *Van Allen v. The Assessors*, 3 Wall. 573. In the one case the property is in the corporation, in the other it is in the individual. And Congress has not only recognized, but has declared the difference, in that it prohibits all State taxation whatever on the one, while it expressly permits it to be levied on the other. The corporation owns the capital stock,

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and whatever that stock may be invested in. As said by Mr. Justice NELSON, "the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal. . . . The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts."—*Van Allen v. Assessors, supra*. And we may add, the insolvency or bankruptcy of the corporation would not imply the insolvency of the shareholder, nor would the fact that the corporation owned real estate constitute the shareholder a freeholder. Shares in corporations are personalty, no matter what the capital stock may be invested in. So, a tax on the shares of national banks is not a tax on the government bonds, in which the capital stock is invested. *Van Allen v. Assessors, supra*. But a tax on the capital stock of a bank, whose capital is invested in government securities not allowed to be taxed, would be a tax on such securities, and illegal.—*Bank Tax Case*, 2 Wall. 200. The result of these holdings is, that capital stock of a corporation, which is invested in non-taxable property, can not be made the subject of State taxation, while the *shares* in the corporation can claim no such exemption. This is a clear discrimination between the two properties, and shows that taxing the one is not taxing the other. The nature and property of the capital stock in corporations are essentially different from the nature and property of the shares in such corporations.

Under our revenue system, we allow a deduction of the amount of capital stock invested in property and taxed as property, only from the assessed value of the capital stock of corporations. We grant no such deduction to the shareholders. Neither do we allow to the corporation, nor to the shareholder any deduction for debts the corporation or shareholder may owe. The discount on account of debts, permitted under our system, is limited to the single subject of solvent credits; for money loaned is, at last, but a credit. Hence, if the tax-payer own no solvent credits, he is entitled to no discount, no matter what may be the amount of his indebtedness. To hold that a shareholder in a national bank is entitled to have his assessment reduced, because some part of the capital stock is invested in property, and taxed as such, would be to accord to him a double discount, while no other tax-payer is favored so much; would be, to allow him a credit for all debts due by him, thus placing him on an equality with the owner of solvent credits, and to allow him a further deduction of a proportionate

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part of the capital stock invested in property, thus placing him, an individual, on an equality with our artificial persons, called domestic corporations. Congress denied to us the right and power to discriminate against investments in national bank shares. It was not the intention of that body that our assessments on such shares should be lighter than the taxes we impose on other moneyed capital. We consider this objection unavailing.

The second section of the act of December 8, 1880, is in the following language: "There shall be assessed and collected in any county where such association is located, upon each share of the capital stock of such association which has escaped taxation for any preceding year since 1874, the same rate of taxation, State and county, as was in each year assessed and collected upon other moneyed capital." Under the first and second sections of the act we are construing, there was assessed at one time on the shares of the National Commercial Bank of Mobile, taxes for the years 1878, 1879, 1880 and 1881. It is urged before us, that the assessment for the years preceding the enactment of the statute was unauthorized, and in violation of article 11, sections 4, 5 and 7 of the constitution of Alabama. Section 4 ordains that there shall not be levied, "in any one year, a greater rate of taxation than three-fourths of one *per centum* on the value of the taxable property within this State." Section 5, employing the same language—*in any one year*—limits the rate of taxation for county purposes to one-half of one *per centum*; and section 7, in the same terms, limits the rate to one-half of one *per centum*, for city, town, or other municipal purposes. The collective sum of the taxes assessed for the four years, shown in this record, greatly exceeds the rates above prescribed. It is contended for the appellee that the word *in* in the constitution, though three times repeated, should be read *for*. Thus read, the constitutional limitations on the power to levy taxes would then be *for* any one year, instead of "*in* any one year." We have been referred to no authorities bearing directly on this question, and, after a pretty careful examination, we have found none.

It will be borne in mind that until December 8, 1880, no legislative attempt was made in this State to tax the shares of national banking associations. It had been declared otherwise in *McIver v. Robinson*, 53 Ala. 456, and in *Sumter County v. National Bank*, 62 Ala. 464. In *Pollard v. State, ex rel.* 65 Ala. 628, we reviewed those decisions, and overruled them, holding, as we have said, that until December 8, 1880, we had no statute authorizing the taxation of national bank shares. Till then we had not declared them a subject of taxation. The legislature levies State taxes, and the assessor assesses them.

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Perry County v. Railroad, 58 Ala. 546, 559. There shall not be levied in any one year a greater rate of taxation, is the mandate of the constitution. No tax on national bank shares having been previously imposed, during the year 1880, the legislature did levy such tax, and, by declaring it should be operative during all the time since 1874, the practical effect was to levy, within that one year, taxes that might exceed three-fourths of one per cent. We are speaking of the levy of taxes, a legislative function, and not of assessment, which is the work of the assessor. The constitutional inhibition is against levying. The purpose was, that property should not be excessively burdened, lest, perchance, it might be driven from the State, or the tax-payer ruined. Levying a tax *per centum* in one year, and declaring that the same rate is applicable to several preceding years during which no tax had been levied, would be equally burdensome to the tax-payer, as if the aggregate had been levied in gross. It would be levying in one year, providing for assessment in one year, and for collecting and turning into the treasury in one and the same year, a sum greatly in excess of the constitutional limit. And to what end? Certainly for future administration and disbursement; for it could not be applied to the support of government in the years then past. It is difficult to draw a distinction between such levy *for* one year, and *in* one year. In either event the burden is the same, and the use and application of the money the same. We hold the attempt then made to levy taxes for the years then passed, was violative of the constitution, and must fail.

This question is distinguishable from what is known as escaped taxes. They have only escaped the assessor. Such taxes had been levied, and therefore the constitution does not inhibit the assessment and collection. So, if there had been a levy of taxes, and by reason of defective machinery such taxes could not be collected, we would not doubt the power of the legislature to remedy the defect by retrospective legislation. What we declare is, that when the legislature proclaims or declares a new subject of taxation not theretofore taxed, or attempted to be taxed, and levies a tax upon it, which, in the aggregate, transcends the constitutional limit, calling it a tax for past years can not heal its infirmity.

We have said above that the levy of taxes is a legislative function. The constitutional inhibition is against levying in any one year a greater rate of taxation than a specified *per cent*. Of course it was not intended by this, to prohibit the enactment of a statute which should operate from year to year, until repealed or altered. The legislative function may be performed in one year, to be operative for successive years.

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The meaning is, that a greater burden than three-fourths of one per cent. shall not be levied, or imposed in and for one year.

To the extent that taxes were assessed for the years 1878 and 1879, the judgment of the Circuit Court is reversed, and here rendered, disallowing those assessments. In all other respects it is affirmed.

Reversed and rendered.

Dudley, Adm'r, v. Steele.

Action by Administrator on Account.

1. *In action by administrator defendant may be called by him to testify as to transaction with his intestate.*—While in an action brought by an administrator the defendant is, under the statute, incompetent to testify in his own behalf as to any transaction with, or statement by the plaintiff's intestate, he may be called as a witness by, and be compelled to testify in favor of, the plaintiff as to such transaction or statement.

2. *Same; not affected by change in language of statute.*—The words, "unless called to testify thereto by the opposite party," were incorporated in the former statute (Rev. Code, § 2704) merely from abundant legislative caution, in recognition of a right which would have otherwise existed; and hence, the omission of these words from the statute, by subsequent amendment, can not be construed as a legislative intention to abrogate the right.

APPEAL from City Court of Selma.

Tried before WILLIAM C. WARD, Esquire, selected by the parties under the provisions of Section 18, Art. VI of the Constitution, the presiding judge having been, for legal cause, incompetent to try the cause.

This was an action of *assumpsit*, brought by Joseph R. Dudley, as the administrator of the estate of Philip Mathone, deceased, against Samuel P. Steele, and was founded on an account for money loaned, and for services rendered by plaintiff's intestate to the defendant.

On the trial the plaintiff had the defendant sworn as a witness and propounded to him the following questions: (1) "Did the plaintiff's intestate ever loan you any money; if so, when, and how much;" (2) "Did the plaintiff's intestate ever do any work for you; if so, when, and what work;" (3) "Did Philip Mathone ever render you any, and what services as overseer; if so, when;" (4) "If the plaintiff's intestate was ever in your employment, state when, and how long, and in what business;" To each of these questions the defendant objected,

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on the ground that he was not competent to testify to any transaction with the plaintiff's intestate. The court sustained the objections, and the plaintiff separately excepted; and now assigns these rulings as error.

PETTUS & DAWSON and F. L. PETTUS, for appellant. (1) The statute (Code of 1876, § 3058) removes all the disabilities under which a party at common law was placed, except the single one, that he could not testify against his adversary "as to any transaction with, or statement by any deceased person, whose estate is interested in the result of such suit." The purpose and policy of the statute "is to exclude the living from testifying *against* the dead, because the latter can not be heard in explanation or contradiction."—*Dismukes v. Tolson*, 67 Ala. 386; *Ins. Co. v. Sledge*, 62 Ala. 566; *Key v. Jones*, 52 Ala. 238. The questions propounded called for testimony which would have been *for*, not *against* the appellant. The exception did not, therefore, apply, and the court erred in sustaining defendant's objections. (2) The omission of the words, "unless called to testify thereto, by the opposite party," from the statute by the amendatory act of 1875 (Pamph. Acts, 1875-6, p. 252), now embodied in section 3058 of the Code of 1876, can not be construed, as contended by counsel for the appellee, as a legislative intention to abridge the competency of parties as witnesses, by not allowing a party to call his adversary to testify as to any transaction with, or statement by the deceased. To hold this would be to hold that the legislature thereby intended to revive the common law as to this particular class of witnesses. But our statutory provisions as to the competency of parties as witnesses were intended as a revision of the common law on that subject, and their purpose was to *enlarge* and not to *abridge* the competency of witnesses.—*Kumpe v. Coons*, 63 Ala. 454; *Hendricks v. Kelly*, 64 Ala. 388. Section 3058 of the Code of 1876 is not intended to be read in connection with section 2704 of the Rev. Code, as parts of the same statute, but as a substitution for it—a revision of the system. If, therefore, a witness is competent under the present statute, if he does not fall within the exception contained in it, if he is not expressly excluded by its terms, he is a competent witness.

J. C. COMPTON, with whom were BROOKS & ROY, *contra*. (1) At common law, a party to a suit was not a competent witness either for himself, or a co-suitor; nor could he be compelled to testify against himself either in a civil or criminal case.—1 Greenl. on Ev. §§ 329-30. (2) The rule of the common law on this subject has been modified from time to time by our statutes; and they have provided a method for the examina-

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tion of a party to a civil suit by his adversary.—Code, 1852, §§ 2330 *et seq.*; Rev. Code, 1867, §§ 2731 *et seq.*; Code, 1876, §§ 3084 *et seq.*, and amendments thereto (Acts, 1878–9, p. 79). There was a further enlargement of the competency of witnesses in civil cases, made by the act of February 14, 1867, which was carried into the Revised Code of 1867, as section 2704. This statute declared that being a party to a record, or interested in the issue tried, did not disqualify a witness; and it made but this exception: “In suits by or against executors or administrators . . . *neither party* shall be allowed to testify against the other as to any transaction with, or statement by the testator or intestate, *unless called to testify thereto by the opposite party.*” The competency of a party to testify “as to any transaction with” the intestate depended solely upon such party being “called to testify thereto by the opposite party;” and then, the statute says, he “shall be allowed to testify against” such party. It was then he became a competent witness in the case, as the only restriction upon his competency had been removed by his having been called by the opposite party to testify in reference to the subject-matter of the restriction or exception. He then became a witness in the case generally, as well for, as against himself, as fully as if no exception had been made in the statute. (3) But section 2704 of Rev. Code was amended and repealed by act of March 2d, 1875, which act has been carried into the Code of 1876, as section 3058. The act has been adjudged to have been intended as a revision of the whole subject of the competency of witnesses, as affected by interest or connection with the suit or proceeding.—*Kumpe v. Coons*, 63 Ala. 448; *Lemay, Ex'r, v. Walker*, 62 Ala. 39. In the statute, as it now stands, the words, “unless called to testify thereto by the opposite party,” are omitted, and the exception is otherwise changed. This exception now applies to all classes of suits or proceedings, provided the offer be to prove by a *party to the suit* a transaction with any deceased person whose estate is interested in the result of the suit. In such case *neither party* can testify as to any “transaction with, or statement by” the deceased person. The statute does not give the opposite party the power to call his adversary to testify as to such matters; but the words that conferred this power are omitted. The failure to re-enact the words, “unless called to testify thereto by the opposite party,” remits parties to the method of making proof of the matters excepted which they had before the enactment of section 2704 of the Revised Code.

SOMERVILLE, J.—The suit is for an account, brought by the plaintiff *as administrator* of the estate of one Mathone,

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deceased, the transaction, upon which the account was based, having transpired between the defendant and the plaintiff's intestate during his lifetime.

The only question presented is, whether the plaintiff can compel the defendant, in such a case, to testify in his, the plaintiff's *favor*, against the objection of the defendant.

It is very clear that the defendant would not have been a competent witness in his own behalf to testify *against* the plaintiff as to any transaction with or statement by the deceased. Section 3058 of the present Code (1876), which removes all incompetency based upon the fact of the witness being a party, or interested in the issue, in other than criminal cases, embodies the specific *exception* that "neither party shall be allowed to testify *against* the other, as to *any transaction with or statement by any deceased person* whose estate is interested in the result of such suit, or when such deceased person, at the time of such statement or transaction, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced."

We have before said that the purpose and policy of this statute is "to exclude the *living* from testifying against the *dead*, because the latter can not be heard in explanation or contradiction."—*Dismukes v. Tolson*, 67 Ala. 386; *Kumpe v. Coons*, 63 Ala. 448. Its chief design, in other words, is to *protect* the estates of decedents against the setting up of fraudulent defenses, and the establishment against them of fraudulent claims or unfounded causes of action. To this end the *law*, with even-handed justice, seals the lips of the one party, where the accident of *death* has sealed the lips of the other. 1 Whart. Ev. § 466.

The reason of the rule established by the exception can have no application, in our opinion, to the present case. The statute declares that "neither party shall be allowed to testify *against* the other" as to such transactions or statements. It is nowhere said that neither party shall be permitted or compelled to testify *for* the other. The rule at common law was, that interest disqualified a witness only from testifying in his own behalf, not *for* the adversary party, and *against his own interest*.—1 Greenl. Ev. § 410. The same principle applies in cases arising under our own statute, which narrows and preserves the common law rule as to the class of excepted cases. The exclusion of the defendant as a witness being for the benefit and protection of the estate, the rule establishing it can be *waived* by the administrator, or opposite party. This is declared to be the law by Mr. Wharton in his treatise on Evidence. "The opposite party may waive the immunity," he says, "by calling as a witness the surviving party to the contract."—1 Whart. Ev. § 475*a*.

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In *Chase v. Evoy*, 51 Cal. 618, it was adjudged, under a similar statute, that the exception did not preclude the administrator from calling one of the parties to the suit to testify as a witness *for* the estate, of which he was administrator.

It is argued that inasmuch as the Code of 1876 (§ 2704) provided that, in the class of cases under consideration, "neither party shall be allowed to testify against the other" as to transactions with the deceased, "*unless called to testify thereto by the opposite party*," the omission of the latter clause from section 3058 of the present Code (1876) must be construed into a legislative intention to abrogate the right which was there recognized. The answer to the suggestion is, that the right of each party to call the other as a witness against himself, or in favor of the party calling him, would have existed without its express authorization, and this was presumptively known to the General Assembly. It must, therefore, have been recognized in the Code of 1867, merely from abundant legislative caution. In cases free from doubt, the mere omission of such clauses in the revision of statutes should not be construed into a legislative intention to abrogate a clear legal right. Such at least should certainly be the rule of construction, where the right in dispute comes within both the letter and spirit of the statute, and the omitted clause falls without the purview of the mischief to be remedied by its enactment; and such is this case.

The court below erred in not allowing the several questions propounded by the plaintiff to the defendant; and the judgment must for this reason be reversed and the cause remanded.

STONE, J., not sitting.

Ex parte Huckabee.

Mandamus.

1. *Mandamus; when will be granted.*—*Mandamus* is an extraordinary legal remedy, and is granted only when a clear, specific legal right is shown, and for its enforcement there is no other adequate remedy.

2. *Same; bill of exceptions.*—If it be conceded that *mandamus* is an appropriate remedy to compel the judge of an inferior court to insert in a bill of exceptions a statement which he has stricken therefrom as untrue in point of fact, or as immaterial, or as inappropriate, the truth of such statement, and a necessity for its introduction into the bill must be affirmatively shown, before it can be pronounced that there is a legal right to its insertion.

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3. *Refusal of primary court to charge as requested; when may be revised.*—The refusal of the primary court to charge as requested, can and will be revised, on proper exception, if it is shown by the bill of exceptions that the instructions were not abstract, or that they were not addressed to the sufficiency of the evidence; and this can be shown without a recital of all the evidence which may have been introduced on the trial.

4. *Mandamus; when will not lie to compel circuit judge to insert clause in bill of exceptions stricken out by him.*—Where exceptions were reserved to the refusal by the court of instructions to the jury, requested by the excepting party, and the judge of the circuit court struck from the bill of exceptions, as prepared and presented to him, the words, "This being all the evidence in the case," an application for a *mandamus* to compel the judge to insert in the bill the words so stricken out, which fails to show that the bill of exceptions, without these words, does not show that the instructions were not abstract, or that the insertion of the words is necessary to show that the instructions were not abstract, fails to show a right to the insertion, and will be denied.

This was an application to this court by Caswell C. Huckabee, a defendant in a civil cause in the Circuit Court of Bibb county, against whom a judgment had been obtained, for a writ of *mandamus*, seeking to compel the Hon. JAMES E. COBB, the judge presiding in said Circuit Court at the time of the trial of said cause, to insert in a bill of exceptions which had been prepared and presented to him by the petitioner, the words, "This being all the evidence in the case," as they occurred in the bill as presented, immediately preceding a statement of instructions given by the court to the jury, which the judge had stricken out before signing the bill. The facts are sufficiently stated in the opinion.

WM. C. WARD, for petitioner. (No brief came to the hands of the reporter.)

BRICKELL, C. J.—*Mandamus* is an extraordinary legal remedy, granted only when a clear, specific legal right is shown, and for its enforcement there is no other adequate remedy. The absence of a clear, specific legal right is fatal to an application for the writ.—*State v. Comm'rs Court*, 3 Porter, 412; *State v. Judge*, 13 Ala. 805. If it be conceded to the relator that it is an appropriate remedy to compel the judge of an inferior court to insert in a bill of exceptions a statement which he has stricken therefrom as untrue in point of fact, or as immaterial, or as inappropriate, the truth of such statement, and a necessity for its introduction into the bill must be affirmatively shown, before it can be pronounced that there is a legal right to its insertion. The words stricken from the bill of exceptions, and which it is proposed the judge shall be compelled to restore, are, "*This being all the evidence in the case.*" The exceptions reserved are to the refusal of instructions to the jury, requested by the relator. The refusal can and will be revised, if it is shown by

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the bill of exceptions that the instructions were not abstract,—that there was evidence before the jury upon which they were based, and to which they could be applied, or were not addressed to the sufficiency of the evidence.—1 Brick. Dig. 248, § 80. This can be shown without a recital of all the evidence which may have been introduced on the trial; and it is difficult to conceive of a necessity for cumbering the bill, in such case, with a recitation of all the evidence,—as well that which is impertinent, as that which is pertinent to the instructions refused.

The application not showing that the bill of exceptions, without these words, does not show the instructions were not abstract, or that their insertion can be necessary to show that they were not abstract, a right to the insertion is not shown. If, as the bill of exceptions now stands, it is not shown the instructions were not abstract, it is certain the insertion of these words could not cure the defect.

Application denied.

The Trustees of Howard College v. Turner.

Assumpsit for Breach of Scholarship issued by College.

1. *Payment of debt to trustee in Confederate money; effect of.*—The principle is firmly settled by the numerous decisions of this court, that whatever liability trustees may have incurred to *cestuis que trust* by accepting Confederate money, during the late war, in payment of debts due to the trust estate, “as to the debtor, the debt is extinguished as completely as if the payment had been made in gold and silver.”

2. *Same.*—Where one subscribed to the endowment fund of a college, a corporation under the laws of this State, prior to the late war, and gave his promissory notes to the amount of his subscription, and afterwards, and during the war, paid the notes in Confederate treasury notes, and received from the trustees, in pursuance of a prior agreement and the by-laws of the corporation, a certificate of permanent scholarship in the college, entitling him to the tuition of one pupil *in perpetuo*, the receipt of the Confederate money by the trustees operated a payment of the notes, and entitled the subscriber to his certificate; and hence, the fact that such payment was made in Confederate money is no defense to an action brought by the holder of the certificate of subscription against the corporation for a breach thereof.

3. *Certificate of permanent scholarship in a college; its effect and obligation.*—A certificate of permanent scholarship, issued by the Trustees of Howard College, a corporation, under the provisions of its charter and by-laws, by which the holder, in consideration of money paid, became entitled to the tuition of one pupil *in perpetuo*, is a valid and binding contract, conferring upon the holder the right to send any fit person within his option to the college as a pupil, to be educated, subject to the usual

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regulations of the institution, free of tuition, and imposing upon the corporation a corresponding legal obligation, a breach of which is a ground of action.

4. *Same; what constitutes a breach thereof.*—The refusal of the corporation, to permit the holder of the certificate of permanent scholarship the benefit thereof, by denying to him the right to appoint a pupil to attend the institution, free of tuition *in perpetuo*, is a breach of the contract evidenced by the certificate, which the holder is authorized to treat as a total breach, and for which full and final damages may be recovered in one action.

5. *Same; measure of damages in action for breach of.*—In *assumpsit* by the holder of such certificate against the corporation for a breach of the contract evidenced by the certificate, the measure of damages is the value of the scholarship, with lawful interest.

6. *Same.*—It not being shown in such case that the scholarship had any marketable value, and in the absence of evidence tending to show that it was of less value at the commencement of the suit than at the date of purchase,—*held*, that *prima facie*, at least, the value of the scholarship was the price agreed to be paid for it.

APPEAL from Perry Circuit Court.

Tried before HON. JOHN MOORE.

This action was commenced on 22d August, 1876, by Matthew Turner against The Trustees of Howard College, a corporation, for the recovery of damages for the alleged breach of an agreement evidenced by a certificate of permanent scholarship issued by said corporation.

The Circuit Court charged the jury *ex mero motu*, among other things, in substance, that if they found from the evidence and the law as given to them by the court, that the plaintiff was entitled to recover, then he was entitled to recover damages from the time the defendant refused to receive the plaintiff's grandson [the pupil shown by the evidence to have been appointed by the plaintiff under the scholarship, and whom the defendant refused to receive as a pupil thereunder] as a pupil in said college on said scholarship to the time of trial; and that in determining the amount of damages he was entitled to recover, they could look at, and consider the annual value of the tuition in said college from 1874 [the time when the evidence showed the tuition was refused under the scholarship] to the present time. To both propositions contained in this charge the defendant separately and duly excepted. The evidence showed that the tuition was at the rate of \$100 for the scholastic year 1874-5; \$90 for that of 1875-6; and \$80 for each year thereafter. The trial resulted in a verdict and judgment for the plaintiff for \$640, from which the defendant appealed. The other facts, and questions raised in the court below, necessary to an understanding of the opinion, are sufficiently stated therein.

WM. M. BROOKS, JOHN F. VARY and WATTS & SONS, for appellant.

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PETTUS & DAWSON, *contra*.

SOMERVILLE, J.—This suit is one for damages, based upon the alleged breach of an agreement made between the defendant corporation, the Trustees of Howard College, and the appellee, who was plaintiff in the lower court. The instrument, which is the basis of the action, is set out *in extenso* in the complaint. It is entitled a "Certificate of Permanent Scholarship," bearing date January the 23d, 1863, and purports to be executed by corporate authority, in the name of the treasurer of the institution, who is shown to have possessed authority to issue such certificates, under the by-laws of the board of trustees establishing the plan of endowment. The recital of the instrument is, that the plaintiff, Matthew Turner, "in consideration of five hundred dollars, by him paid to said college," according to the "terms of the plan of endowment, is entitled to a permanent scholarship, as therein, in such cases, provided." This plan, as embodied in the certificate, provides that any person, "paying five hundred dollars into the treasury of Howard College, shall be entitled to a *permanent scholarship* in this college, that is, to *the tuition of one pupil* IN PERPETUO." Such certificate is made "transferable, as other property, at the pleasure of the holder." It is shown, further, that the plaintiff had subscribed to the endowment fund of the college, in December, 1859, executing his five promissory notes, each payable to the Trustees of Howard College, in the sum of one hundred dollars.

These notes were taken up and discharged, three of the five, by the payment of the full amount due on them, in *Confederate money*, upon the 23d of January, 1863, when the certificate of scholarship was dated and delivered.

It is contended, in the first place, that the defendant corporation had no authority to receive payment of the notes in Confederate money or currency. Being an eleemosynary institution, it is insisted that the trustees and managers held the endowment fund and other corporate property in trust for the various subscribers; and that the receipt of such an illegal currency was a breach of trust, and did not operate to discharge the debt due by plaintiff, nor entitle him to the ownership of the certificate of scholarship.

It is true that the five promissory notes in question were payable, on their face, in the lawful currency of the United States. They were executed before the inauguration of the war between the States, and prior to the existence of the currency known as Confederate money; and their payment could have been exacted in lawful dollars, such as constituted a legal tender for the payment of debts. — *Confederate Note Case*, 19 Wall. 548;

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Riddle v. Hill, 51 Ala. 224. But this right was waived by the receipt of a depreciated currency, which was at the time the only currency of the country, passing as money, and circulating of necessity as cash in all the transactions of daily business. The principle is firmly settled by the numerous decisions of this court, that whatever liability trustees may have incurred to *cestuis que trust* by accepting such a currency in payment of debts due the trust estate, "as to the debtor, the debt is extinguished as completely as if payment had been made in gold and silver."—*Waring v. Lewis*, 53 Ala. 615; *High v. Snedikor*, 57 Ala. 403; *Parks v. Coffey*, 52 Ala. 32; *Hill, Adm'r v. Erwin*, 60 Ala. 341; *Confederate Note Case*, 19 Wall. 548, *supra*; *Wilmington, &c. Railroad Co. v. King, Ex'r*, 91 U. S. 3; *Thorington v. Smith*, 8 Wall. 1.

There is nothing, then, in the argument, that the obligations given by the plaintiff, as a subscription to the endowment fund of the college, were permitted to be discharged in Confederate States treasury notes. The case is to be considered as if the question of Confederate money was entirely eliminated from the transaction.

We can not entertain the slightest doubt that the agreement imported by the certificate in question is a *contract*, for the breach of which an action of *assumpsit* for damages will lie. A contract, in legal contemplation, as said by Mr. Parsons, is "an agreement between two or more parties, for the doing or not doing of some particular thing."—1 Parsons on Contr. (6th Ed.) 6. Of course such an agreement must be based on sufficient consideration; and this is made a part of the definition by many elementary writers.—2 Black. Com. 446. It is defined by Mr. Wharton to be "an interchange by agreement of legal rights," involving the assent of two or more persons.—1 Whar. on Contr. § 1. Every element of these, and similar definitions enters into the agreement under consideration in the present case. The plaintiff promised to pay defendant the sum of five hundred dollars, as the consideration which was to move from him; and this obligation he has, in the eye of the law, fully discharged. The promise of the defendant, though implied, rather than express, is entirely unambiguous. The plaintiff is declared to be "*entitled to a permanent scholarship in the college*," which is defined to be "the tuition of one pupil *in perpetuo*,"—that is, the right to send any fit person within his option to the college, as a pupil, to be educated, subject to the usual regulations of the institution, *free of tuition*. It would be doing violence to the rules of both language and law to say that the plaintiff was "entitled to" to this right, which he had thus purchased, and yet, that the defendant was at liberty to deny and obstruct its exercise, to utter abrogation, without le-

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gal liability. The plain meaning of the language is, that the defendant corporation, in consideration of the five hundred dollars received, *promises* to secure to the plaintiff the benefit and enjoyment of this scholarship, whether he might transfer it for profit, or might charitably elect to dispense it as a benefaction. It is immaterial that the *motive* of the plaintiff in making his subscription may have been to advance the cause of education. There is a manifest distinction, in matters of contract, between a motive which induced entering into it, and the actual consideration of the contract.—*Philpot v. Gruninger*, 14 Wall. 570. One subscriber to the stock of a projected railroad may be actuated solely by a selfish desire to enhance the price of property he may own adjacent to the line of the road. Another may be moved only by a laudable desire to promote the public welfare. The motive in neither case would change the legal rights or obligations of the subscribers as stockholders. The consideration proper of a contract is the price voluntarily paid for a promisor's undertaking.

The certificate of scholarship must be construed, according to every sound and just rule of legal construction, to impose on the appellants in their corporate capacity, a legal duty, the breach of which is a ground of action. It may be regarded, we think, as an incontrovertible proposition, everywhere recognized, that every violation of a legal right, in contemplation of law, causes a legal injury. "If the infraction is established, the conclusion of damage inevitably follows. This deduction is made," as observed by a recent author, "though it actually appears, and is recognized in the case, that there was in fact no injury, and even a benefit conferred."—1 Sutherland on Dam. 2. "Wherever," says Mr. Sedgwick in his treatise on Damages, "the breach of an agreement, or the invasion of a right is established, the English law infers some damage to the plaintiff."—1 Sedgw. on Dam. (7th Ed.), 71 [47.] Every injury," said Lord Holt, in *Ashby v. White*, 1 Salk. 19, "imports a damage."

The only point of difficulty presented to our mind in the case is the proper measure of damages. The least damages that can be allowed for a clear breach of legal duty are nominal damages—a principle too well settled for discussion.—*Adams v. Robinson*, 65 Ala. 586; Sedgw. on Dam. (7th Ed.), 71 [47.] The rule, as generally expressed, is familiar, that the damages to be recovered must always be the natural and proximate consequence of the act complained of.—2 Greenl. Ev. §256. This excludes the idea of such damages as are merely consequential, remote or speculative, and limits the plaintiff's recovery, in actions *ex contractu*, to a just compensation for the actual loss which he has sustained by the defendant's failure to comply with his ob-

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ligation or promise.—*Rose's Ex'r v. Bozeman*, 41 Ala. 678.

The question recurs, what actual damages has the plaintiff suffered in legal contemplation? The breach complained of is, that the defendant refused to permit the plaintiff to enjoy the benefit of the permanent scholarship which he had purchased, by denying to him the right to appoint a pupil to attend the institution, free of tuition, *in perpetuo*. The gravamen of the averment is the refusal of the defendant to recognize the binding obligation of the contract for the sale of the "scholarship." This refusal the plaintiff was authorized to treat as a *total breach*, for which full and final damages could be recovered. A just analogy in principle is found in that class of contracts in which an obligor agrees to provide for and support an obligee during the latter's natural life. A refusal to comply, at any given time, has been uniformly construed into an attempt on defendant's part to abrogate the whole agreement, which is a total breach.—*Schell v. Plumb*, 55 N. Y. 592; *Fales v. Hemenway*, 64 Me. 373; 1 Sedg. on Dam. (7th Ed.) 480 [226]; *Colvin v. Corwin*, 15 Wend. (N. Y.) 557.

It is no objection that, in cases of this nature, the plaintiff could not in person have reaped the benefit of the purchased privilege either himself or for the enjoyment of his immediate family. Contracts in the interest of education and of charity, being highly beneficial to the State, should be greatly favored by the law. The power to appoint a benefit to another is a valuable right, the legal value of which can not be different from the power to designate one's self as the beneficiary of the right. If one, for example, deposit a sum of money with a banking institution, under the agreement that the interest shall be paid to such charitable uses as the depositor or his executors shall designate, the right, we apprehend, would be none the less valuable, because others, and not the owner of the fund, were to be the beneficiaries of his bounty. The same would be true if one should pay an agreed sum to the trustees of a hospital for lunatics, for the privilege of designating a pauper insane person, as a patient to be boarded and cared for by the managers of such institution from time to time. A refusal of the obligors in these cases to comply with their agreement would clearly be a breach of duty towards the obligees, from whom the consideration moved, and not towards the object of the charity. The fact that these cases constitute trusts, for the enforcement of which a court of equity will, in certain contingencies, take cognizance, does not prohibit the trustees from being sued at law for damages, for the non-performance of engagements which they have expressly assumed.—2 Perry on Trusts, § 842.

The measure of damages suffered by the plaintiff in the present case.

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ent case is, in our judgment, the value of the scholarship, with lawful interest, of the enjoyment of which he has been deprived by the wrongful act of the defendant. We admit the inherent difficulty of arriving at this valuation, but this is no proper objection, if we can find a safe rule of estimate, based upon the just analogies of the law. Where a purchaser of personal property, who has paid the price in advance, brings an action for the breach of a special contract to deliver, the measure of damages is the value of the property, or article at the time and place of delivery.—*Rose's Ex'r v. Bozeman*, 41 Ala. 678; *McGehee v. Posey*, 42 Ala. 330; Sedgw. on Dam. (7th Ed.) 580-81 [274-5]. In actions of covenant for breach of warranty in the sale of lands, the prevailing rule for the measure of damages is the consideration-money and interest. 2 Greenl. Ev. § 264, note (a). In the case of stocks, and perhaps other like property of fluctuating value, which have been purchased and paid for, there is a growing tendency to allow the highest value up to the time of trial, on failure to deliver.—Field on Dam. §§ 256-7. It is not shown that the scholarship in question had any marketable value. The right to appoint under it may never have been exercised. In one sense, it may have been worth more to one person than to another. One owner may have used it every year, and another may never have used it at all. In view of these intrinsic difficulties, we are rather inclined to adopt the view that presumptively its true value is the contract price, which the parties themselves have placed upon it in the contract of sale and purchase.—*Houston, &c. R. Co. v. Burke* 55 Tex. 323; S. C. 40 Amer. Rep. 808. This price was five hundred dollars in lawful money—a sum for which the defendant was accustomed to sell permanent scholarships, and which purchasers commonly agreed to give. It is safe to say that *prima facie*, at least, the value of the right was the price agreed to be paid for it, in the absence of evidence showing the contrary. There is no evidence in the record tending to show the right to have been of less value at the time of suit brought, than at the date of purchase. The college is shown to be still in successful operation, open for the care and education of all applicants.

It would, perhaps, better comport with the ends of justice, if we could arrive at the conclusion that the amount of damages could be gauged, to some extent, by the value of the consideration actually paid, the greater portion of which was, as above stated, Confederate money or treasury notes. But we know of no sound principle on which this can be done. The contract of the parties, having been made in the year 1859, had in view lawful money of the United States. The contract price then, which was in the mind of the contracting parties, was the law-

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ful currency of the country. The measure of damages is not the consideration, which is paid by way of compromise or concession, but the value of the property to be delivered, or right to be enjoyed, because "this is the remuneration fixed by agreement."—1 Sedgw. on Dam. 203. Mere inadequacy of consideration is no objection to a plaintiff's right of recovery upon a contract. The valuation placed by the parties upon the scholarship was evidently in good money, the right to the payment of which was waived and lost by the defendant's voluntary acceptance of a depreciated currency.

There are some analogies strongly favoring the measure of damages adopted by the Circuit Court, which seems to have been the annual value of tuition from the date of the breach to the day of the trial. The objections to it, however, are its fluctuating uncertainty, increasing in amount with the protraction of the litigation, and its speculative nature in assuming that the plaintiff would always be punctually ready to claim the benefit of his scholarship, with every and each succeeding year. The charge of the court, in this particular, was more favorable to the appellant than the law, in our view, authorized.

We discover no error in the rulings of the court, which could have been prejudicial to appellant, and the judgment must be affirmed.

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Action for Benefit Certificate issued by the Supreme Commandery of the Knights of the Golden Rule.

1. *Supreme Commandery of the Knights of the Golden Rule, a mutual life insurance company, and its certificate, entitled "Knight's Benefit Certificate," a contract of insurance.*—The Supreme Commandery of the Knights of the Golden Rule, a corporation created and organized under the laws of the State of Kentucky, is, in contemplation of law, a mutual life insurance company; and a certificate issued by that corporation, entitled a "Knight's Benefit Certificate," by which the corporation promises to pay a specified amount to the widow of the holder of the certificate, on his death, in consideration of his having become a member of the order, and having paid the fee for admission to membership, and of his payment in the future of all assessments levied and required by the corporation, on condition that he remained a member of the order, in good standing, and complied with all its laws then of force, or subsequently enacted,—has all the essential elements of a contract of life insurance by a mutual insurance company with one of its members.

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2. *Same; when a subsequent by-law providing a forfeiture of certificate made a part of contract.*—Where such certificate is silent as to the consequence, if the holder should die by his own hand, but recites that any violation of the “requirements of the laws now in force, or hereafter enacted, governing the order, or this class, shall render this certificate null and void,” and that a condition upon which its obligation depends, is “the full compliance with all the laws of the order now in force, or that may hereafter be enacted;” and it was issued, and was accepted by the assured in writing, “subject to the laws of the order now in force, or which may hereafter be enacted by the Supreme Commandery;” and, at the time it was issued, there was a general law of the corporation, rendering it a condition upon which a certificate could issue, and upon which its benefits could be realized, that the member to whom, or upon whose life it was issued, should comply with the “general laws of the order then in existence, or which might thereafter be enacted;” but the by-laws contained no provision declaring an avoidance or forfeiture of the certificate in the event the holder should die by his own hands,—held that, by force of the recitals, stipulations and provisions above noted, a by-law, enacted by the corporation after the certificate was issued and accepted, providing that a certificate of this class should be forfeited if the member, *whether sane or insane*, should take his own life, entered into, and formed a part of the certificate, avoiding it in the event the holder, *whether sane or insane*, should take his own life.

3. *Power of corporations to change contracts by subsequent by-laws; when such by-laws become part of the contract.*—While it is only existing by-laws of a corporation which are presumed to be known, and in reference to which it is presumed corporate contracts are made; and while it is true that a corporation has not the power, by laws of its own enactment, to disturb or divest rights which it had created, or to impair the obligation of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations; yet, parties may contract with corporations in reference to laws of future enactment, and may agree to be bound and affected, as they would be bound and affected if such laws were existing; and they may thereby consent that such laws may enter into, and form part of their contracts, modifying or varying them.

4. *Life insurance; meaning of the words, “takes his own life.”*—The words, “takes his own life,” when used in a clause of a policy of life insurance providing for a forfeiture, have a known and definite legal signification, importing *suicide*; that the policy holder must not become a *felo de se*; must not “deliberately put an end to his own existence, or commit any unlawful, malicious act, the consequence of which is his own death; and this implies that he must be “of years of discretion and in his senses.”

5. *Same; plea setting up the taking of life as a forfeiture; when insufficient.*—Hence, a plea to an action on a policy of life insurance, setting up a forfeiture, and averring, as a ground therefor, that the assured came to his death by taking his own life, is sufficient, although it is not averred that the self-destruction was willful, or that the assured was sane at the time he took his life. Such an act being averred, if it is intended to excuse it because of the mental unsoundness of the assured at the time of its commission, that fact, the matter of excuse, should be replied by the plaintiff.

6. *Same; forfeiture of by suicide.*—A clause in a policy of life insurance, providing for a forfeiture in the event the assured should, while sane, take his own life, is the mere declaration or expression of the implication of the law; as such an event would operate a forfeiture in the absence of an express provision in the policy to that effect.

7. *Same; may provide for forfeiture by assured taking his own life while insane.*—A life insurance company may lawfully stipulate in its policy

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for a forfeiture thereof, in the event the assured should take his own life *while insane*.

APPEAL from Limestone Circuit Court.

Tried before Hon. HENRY C. SPEAKE.

This was an action by Sarah M. Ainsworth, widow of S. M. Ainsworth, deceased, against The Supreme Commandery of the Order of the Knights of the Golden Rule, a corporation created and organized under the laws of the State of Kentucky; was founded on an instrument in writing called a "Knight's Benefit Certificate;" and was commenced on the 28th March, 1882. The instrument declared on is set out *in hæc verba* in the complaint, and, omitting the caption and signatures, is in the following words: "This certifies that the order, 'Knight of the Golden Rule,' has been conferred upon comrade S. M. Ainsworth, and that he is a member of the order in good standing, in Castle Limestone, No. 137, located at Athens, State of Alabama. And in consideration of the representations and declarations made in his application for this certificate, which application is on file in the Supreme Secretary's office, and is made a part hereof, and the payment of the admission fee of one dollar; and in consideration of the payment hereafter to the Knights' Benefit Fund of this class of the Order, of all assessments as levied and required by the Supreme Commandery, the full compliance with all the laws of this order, now in force, or that may hereafter be enacted, and the being in good standing under said laws, the sum of \$2,000, together with accrued assessments, will be paid from the Knights' Benefit Fund of the Third Class of this Order, by the Supreme Commandery, Knights of the Golden Rule, to his wife, Sarah M. Ainsworth, as said comrade has directed in his application for this certificate, or as he shall hereafter direct in an application for a change thereof, under the laws of the order, upon due notice and proof of his death, and proof of his good standing in the Third Class of the order at the time of his death, and the surrender of this certificate, but not otherwise. Provided, however, that if there shall not be sufficient members in this class to pay the maximum benefit, there shall only be paid a sum equal to one dollar for each member in good standing in this class at the time of the death of said comrade, S. M. Ainsworth, less ten per cent. to the expense and reserve fund, as provided by law, together with the full amount of said comrade's accrued assessments, paid by him in this class. And provided further, that any violation of the above mentioned conditions, or of the requirements of the laws now in force, or hereafter enacted, governing the order, or this class, shall render this certificate null and void, in which event the Supreme Commandery shall not be liable for the above sum or any part thereof. In witness whereof," etc.

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The defendant filed a special plea, the substantial averments of which are stated in the opinion, to which the plaintiff interposed a demurrer, assigning, in substance, the following grounds: (1) That the by-law providing a forfeiture in the event any member should take his own life, whether sane or insane, was enacted after the insurance was perfected; and (2) that the plea fails to aver that said S. M. Ainsworth took his own life *willfully*. This demurrer was sustained by the court; and the defendant "refusing to plead further in this cause," a judgment was rendered against it in plaintiff's favor for two thousand dollars, and costs. From that judgment the defendant took this appeal, and here assigns the ruling of the court on the demurrer to the plea as error.

G. C. CHANDLER, and E. MAYES, for appellant.—(1) The general proposition is admitted, that by-laws in violation of common rights are void; as also are those which seek to establish rules violative of the contract rights of third parties. But it is maintained that what may be bad, considered merely as a *by-law*, may yet be good, considered as a contract; since a man may part with a common right, or a contract right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law passed without his assent, or perhaps knowledge, by those who might not know, or would not consult his individual interests. Hence, it will be found that a by-law may be void as against strangers, or members who do not assent to it, and yet be good as a contract by members who do assent to it.—Ang. & Ames on Corp. § 342; *Stetson v. Kempton*, 13 Mass. 272; *Davis v. Proprietors, etc.*, 8 Met. 321; *Adley v. Whitstable Co.*, 17 Ves. 323. (2) Ainsworth assented to the by-law in several different ways, and at several different times: First, by operation of the constitution of the association when he joined it, the company being organized on the mutual plan. An individual insured in a mutual insurance company becomes a member of the corporation by that act, and is bound to inform himself of its rules and regulations (*a portion* of its constitution), and he is bound by them.—*Mitchell v. Lycoming Mut. Ins. Co.*, 51 Penn. St. 402; *Belleville Ins. Co. v. Van Winkle*, 1 Beasl. 333; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. 348; *Diehl v. Adams Mut. Ins. Co.*, 58 Penn. St. 443; *Coles v. Iowa St. Mut. Ins. Co.*, 18 Iowa, 425; *Woodfin v. Asheville Mut. Ins. Co.*, 6 Jones Law (N. C.) 558. Second, by his application, in which he expressly agreed: "I accept my K. B. Certificate subject to the laws now in force, *or which may be hereafter enacted* by the Supreme Commandery." And, third, by accepting the certificate of membership, with its stipulations and conditions. (3) Where a policy is expressly made subject to the by-laws, they

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become an essential part of the contract of insurance, and a strict compliance with their provisions and conditions is necessary to sustain an action on the policy.—*Wellcome v. People's Eq. Mut. Fire Ins. Co.*, 2 Gray, 480; *Bowditch Mut. Fire Ins. Co. v. Winslow*, 3 Gray, 415; *Gardiner v. Piscataquis Mut. Fire Ins. Co.*, 38 Me. 439. It will not do to say that these principles do not apply to by-laws to be passed in the future, *if the contract contemplates such future passage*; because such a position is subversive of what is perhaps the most definitely settled principle of all our principles of corporations: That where a charter (or contract) is granted and accepted with a power reserved to alter or amend, such alteration or amendment is binding. That is the doctrine of the Dartmouth College case, and all the flood of cases following it. See Bump's Notes of Con. Dec. p. 188, and cases cited; Ang. & Ames on Cor. § 342. (4) Upon the question of a voluntary suicide, intentionally committed by a sane man in the possession of his faculties, knowing how to adapt means to ends, and conscious of the immorality of the act, there is not, as indeed there could not well be, any difference of opinion; and all the authorities agree that such self-slaughter is within an exemption, contained in the policy, from liability on death by suicide, or "death by his own hand." May on Ins. § 307; Bliss on Life Ins. §§ 242-3. And if there is no such clause in the policy, such a death would defeat it.

Washington Ins. Co. v. Wilson, 7 Wisc. 169; *Hartman v. Keystone Ins. Co.*, 21 Penn. St. 466; *Horn v. A. & U. F. Life Ass'n Co.*, 7 Jur., N. S., 673; *Amiable Ins. Co. v. Bolland*, 2 Dow. & Clark, 1; *Moore v. Woolsey*, 4 E. & B. 243; *Reed v. Royal Ex. Ass'n Co.*, Peake's Add. Cases, 70; *Hatch v. Mut. Life Ins. Co.*, 120 Mass. 550; Bliss on Life Ins. pp. 397; 399, 400. The real question arises in that class of cases in which the policy does provide against death by suicide, or by the hand of the insured, and in which it is claimed that the fatal act was the result of insanity. If the policy *merely* provides that suicide, or death "by his own hand" shall avoid the contract, the weight of authority is, that the company remains liable, on the ground that the acts of the party *are not his own volitions*. See *Life Ins. Co. v. Terry*, 15 Wall. 580; *Gay v. Union Mut. Life Ins. Co.*, 9 Blatch. 142; *Breasted v. Farmers' Loan & Trust Co.*, 4 Hill, 73; S. C. affirmed, 8 N. Y. 299; *Van Zandt v. Mut. Ben. Life Ins. Co.*, 55 N. Y. 169; *Eastabrook v. Un. Mut. Life Ins. Co.*, 54 Me. 224; *Phillips v. La. Eq. Life Ins. Co.*, 26 La. An. 404; *St. Louis Mut. Life Ins. Co. v. Graves*, 6 Bush, 268; *Nimick v. Mut. Ben. Life Ins. Co.*, 3 Brewster, 502; *Cooper v. Mass. Mut. Life Ins. Co.*, 102 Mass. 227. The principle to be deduced from these decisions is, that the term, "die by his own hand," which is agreed to be synonymous with

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suicide, has a technical legal meaning; that the correct use of either term includes the idea of willfulness, while the correct use of the term, "insane," excludes that idea; and, therefore, in pleading to actions on such policies, it is not necessary to aver that the act was willful.—Stephen on Plead., Rule VII, Sub-rule 4. (5) Where the policy provides for a forfeiture when a member takes his own life, *whether sane or insane*, as in this case, it would be wretchedly bad pleading to allege willfulness. That is included by the clause, "sane or insane." The following authorities are conclusive on this point: *Chapman v. Rep. Life Ins. Co.*, 6 Biss. 238; *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; *Degogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 235. (6) The only case which we have seen that seems seriously to militate against the views advanced in this brief, is *Becker v. Farmers' Mut. Ins. Co.*, 48 Mich. 610. But in that case the policy was not made subject to by-laws, to be passed in the future, as we understand the case; and that is the difference which removes the case at bar entirely from under its authority. (7) If it is a sound proposition, that, under this policy, the suicide must have been deliberate and willful, then the insanity, to the extent of an entire absence of co-operating will, should have been replied to the plea. For every man is presumed to be sane until the contrary is shown, and to intend to do that which he does do.

McCLELLAN & McCLELLAN, and J. J. TURRENTINE, with whom were WATTS & SONS, *contra*.—(1) The only ground of forfeiture set up in the plea to which the demurrer is interposed, is a by-law adopted by the appellant nearly two months after S. M. Ainsworth took out the policy sued on, with which he had no connection. The rights of the parties under the policy had vested prior to the enactment of the by-law, and, therefore, the by-law, as far as this policy is concerned, is retroactive, null and void.—78 N. Y. 159, 178; 31 Mich. 458; 17 Penn. St. 136; 34 Me. 451; 2 Gray, 543; 45 N. H. 292; 21 Barb. 513; 19 Ala. 619, 707, 439; 7 Johns. 477; 9 Cal. 112; 1 Keble, 733; T. Charl. 173; Ang. & Ames on Cor. 336-45; Cooley on Con. 273-76, 290-92. The appellant had no power conferred on it by its charter to pass a retrospective by-law.—2 Gray, 543-9; Ang. & Ames on Cor. 339-45. Nor does the by-law, on its face, give any indication that it was intended to have any but a prospective operation.—19 Ala. 619, 707, 439. (2) The position of appellant's counsel, that the appellee must submit to this annihilation of her vested rights, because this is a *mutual* insurance company, can not be maintained. As far as this policy is concerned, she is as much entitled to protection as a stranger would be.—Bliss on Ins., § 463,

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p. 734; 17 Penn. St. 136; 34 Me. 451. (3) But it is contended that this by-law, though bad as a by-law, is good as a contract. There is nothing in the record to show that S. M. Ainsworth ever saw, knew, or heard of any such by-law. It is, however, sought to be transformed into a contract, because it is stipulated in the policy that the holder would abide by any by-law that might "thereafter be enacted." But this gave no power to the appellant to deprive the holder of his vested rights under the policy.—31 Mich. 458; 2 Gray, 543, 546; 78 N. Y. 159, 178; 34 Me. 451; 4 Metc. 164. The analogy sought to be drawn from the power reserved by the legislature to alter, repeal, or amend a railroad or other charter, affords no support whatever for the by-law. Even in such case the obligation of a contract is preserved inviolate.—99 U. S. 700, 748; 93 U. S. 524; Wade on Retro. Laws, 81-3. (4) The appellant's counsel have succeeded only in producing cases in which a member or stockholder of a corporation has been held to have bound himself by express assent to a prospective by-law, otherwise improperly adopted. Even here the authorities, *supra*, abundantly show that no implied consent or acquiescence will purge the usurpation. Informed, affirmative action alone will preclude the member or stockholder from asserting the irregularity or informality of the passage of the by-law, even as to its future operation.—2 Gray, 543, 544; 31 Mich. 458; 78 N. Y. 159; 4 Metc. 164; 34 Me. 451. (5) The clause under discussion, that S. M. Ainsworth would abide by any by-law "thereafter enacted," is good for too much or too little for the appellant. If it thereby had the power to subsequently alter the contract in one particular, it had it in all. If it could afterwards relieve itself from responsibility in case Ainsworth died "insane," it could, with equal propriety, elude liability, no matter from what cause his life ended. No such absurd construction will or can be contended for. That clause conferred merely the power of direction, regulation, and management, and left unaffected the substantial obligations of the parties. (6) When a forfeiture in an insurance policy is stipulated for in case of "suicide," "death by his or her own hand," or "he or she takes his or her own life," it means a felonious, criminal act, by, of course, a person capable of deliberate, intentional conduct.—4 Hill (N. Y.), 73; 8 N. Y. 299; 3 Man. & Gr. 639; 7 Heisk. 567; 25 Min. 534; 54 Me. 224; 15 Wall. 580; 74 Penn. St. 176; 93 U. S. 232; May on Ins. 347-80. The forfeiture provided for in the by-law is the same as those above, except that the words, "sane or insane," are added. These words do not nullify the previous portion of the forfeiture, "take his or her own life," nor obliterate the settled construction placed thereon. He or she must still take "his or her

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own life" *felo de se*, without regard to whether "he or she is sane or insane," before the forfeiture is incurred. Such is the exact legal significance of the language. (7) The only instances, so far as our examination goes, in which a forfeiture similar to the one here involved has been passed on, are *Becker v. Farmers' Mut. Ins. Co.*, 48 Mich. 610; 34 Wisc. 389; May on Ins. 380-1; 93 U. S. 384; 70 Mo. 27; 65 N. Y. 243-52.

BRICKELL, C. J.—A contract of insurance is defined as "an agreement by which one party, for a consideration (which is usually paid in money, either in one sum, or at different times during the continuance of the risk), promises to make a certain payment of money, upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance, the thing insured is property; in life or accident insurance, it is the life or health of a person." *Commonwealth v. Wetherbee*, 105 Mass. 149. The instrument in writing upon which this suit is founded, and which is set out in full in the complaint, entitled a "Knight's Benefit Certificate," has the elements and characteristics of a contract of life insurance. It purports to have been issued by the "Supreme Commandery of the Knights of the Golden Rule," which is averred to be a corporation, created and organized under a law of the State of Kentucky. The commandery thereby promises, on the death of the husband of the appellee, to pay her two thousand dollars, in consideration of the husband having become a member of the order, and having paid the fee for admission to membership, and of his payment in the future of all assessments levied and required by the supreme commandery, upon the condition that he remained a member of the order, in good standing, and complied with all the laws then of force, or subsequently enacted. These are the essential elements of a contract of life insurance, made by a mutual insurance company with one of its members. Life is the risk, and death is the event upon which the insurance money is payable. There is not, as in ordinary contracts or policies, a stipulation for the payment of premiums fixed and certain in amount, at the inception of the risk, and at periods, definitely appointed, during its continuance. The payment of the fee for admission to membership, and of the assessments levied and required by the commandery, are the equivalent of premiums, and form the pecuniary consideration of the contract. The condition expressed, that the assured shall remain a member of the order in good standing, observing its laws, is the expression of that which is implied in all insurance of members by mutual companies. The members of such companies are presumed to know the charter and by-laws, and to contract in reference to

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them, though they may not be recited or referred to in the contract.—Bliss on Life Insurance, § 463 *et seq.*; May on Insurance, § 552. Nor is the character or legal effect of the contract varied, because the objects and purposes of the association are benevolent and charitable, rather than speculative, or the derivation of profits from the transaction of business. There are many such associations, having various names, and similar objects and purposes, which are, in contemplation of law, mutual life insurance companies, and as such their contracts are construed and enforced by the courts. Policies, or certificates, issued by them have the essentials and characteristics of such contracts; the payment by the one party in some form, and under some designation, of a pecuniary consideration, and the observance of prescribed duties during the continuance of the risk; and the promise and obligation of the other party, when death happens, to pay the sum assured.—*Commonwealth v. Wetherbee, supra*; *Bolton v. Bolton*, 73 Me. 299.

The plea interposed does not deny the death of the assured; or that while living he paid the assessments levied and required by the supreme commandery; or that, at the time of death, he was a member of the order in good standing. The averments are, that he came to his death by taking his own life, and that, at the time of the issue of the certificate, there was a general law of the association, rendering it a condition upon which a certificate could issue, and upon which its benefits could be realized, that the member to whom, or upon whose life it was issued, should comply with the “general laws of the order then in existence, or which might thereafter be enacted;” that the present certificate was issued and was by the assured accepted in writing, “subject to the laws of the order now in force, or which may hereafter be enacted by the supreme commandery.” On its face the certificate recited, among other things, that any violation of “the requirements of the laws now in force, or hereafter enacted, governing the order or this class, shall render this certificate null and void.” And in another place it is recited as a condition upon which the obligation of the certificate depends: “The full compliance with all the laws of the order now in force, or that may hereafter be enacted.” The plea further avers the enactment or adoption of a law, by the terms of which a certificate of this class was forfeited, if the member, *whether sane or insane*, should take his own life; the enactment of which was subsequent to the issue of the certificate. The point of controversy is, whether this law, by force of the recitals and stipulations to which we have referred, enters into and forms part of an antecedent certificate, avoiding it in the event a member, *whether sane or insane*, should take his own life.

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The power to make by-laws for the government of the corporate body, fixing and regulating its own duties and that of its members, not inconsistent with its charter, or the purposes and objects of its creation, not repugnant to the common law, or to the laws of the State, constitutional and statutory, is an attribute of every corporation. The power is regarded as of so much importance that it is seldom left to implication, but is in express terms conferred by the law from which corporate existence is derived.—2 Kent, 296; Ang. & Ames on Corporations § 110; 2 Wait's Actions & Defences, 366. When duly enacted by the body to whom the corporate legislative power is delegated, by-laws are binding upon all the members of the corporation, who are presumed to know them, and to contract in reference to them.—Ang. & Ames on Corporations, § 325; Bliss on Life Insurance, § 463. It is the existing by-laws which are presumed to be known, and in reference to which it is presumed corporate contracts are made; as it the existing municipal law of the place in which a contract is made, or is to be performed, that parties are presumed to be conversant with, and which incorporates itself into the contract, measuring their rights and duties. A corporation has not capacity, as the legislative power from which it derives existence has not competency, by laws of its own enactment, to disturb or divest rights which it had created, or to impair the obligation of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations.—Ang. & Ames on Corporations, § 399; Bliss on Life Insurance, § 463; *Becker v. Far. Mut. Ins. Co.*, 48 Mich. 610; *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray, 543; *Great Falls Mut. Ins. Co. v. Harvey*, 45 N. H. 292.

The certificate is silent as to the consequence, if the member whose life was assured should die by his own hands; and the by-laws of the association, or order, when the certificate was issued, contained no provision declaring in that event an avoidance or forfeiture of the certificate. We are not aware that it has anywhere been expressly decided, that voluntary self-destruction by one whose life was insured, and of whose sanity there was no question, would avoid the contract of insurance; or rather, would not fall within its risk, though in that event there was not expressed an exception to the liability of the insurer. The authorities generally seem to proceed upon the tacit or expressed concession or admission, that such is the law. In *Moore v. Woolsey*, 4 Ell. & Black. 243, Lord CAMPBELL said: "If a man insures his life for a year, and commits suicide within the year, his executors can not recover upon the policy; as the owner of a ship who insures her for a year, can not recover upon the policy, if within the year he caused her to be sunk; a stipulation that, in either case, upon such an event, the

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policy should give a right of action, would be void." In *Amicable Insurance Society v. Bolland*, 2 Dow. & Clark, 1, (known as *Fauntleroy's case*), it was held by the House of Lords, that though there was not in the policy an exception of the liability of the insurer, in the event the assured came to his death by the hands of public justice, the exception would be implied for the reason, that an express contract for liability in that event would contravene good morals and sound policy. The inference or implication of the law was, therefore, that the execution of the assured by the hands of public justice, for the commission of crime, is not within the risk of the policy. A construction, or an implication, which will preserve the legality of a contract, is preferred to one which will have the opposite effect. Referring to *Fauntleroy's case*, it was said by Wood, V. C., in *Horn v. Anglo-Australian and Universal Fam. Life Ins. Co.*, 7 Jurist, N. S. 673: "The argument might be pressed, although I do not know that any case has so decided, to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing a felony, and losing his life thereby." In *Hartman v. Keystone Ins. Co.* 21 Penn. St. 466, BLACK, C. J., said, that though the policy was silent in reference to self-destruction, if the accused committed suicide, he was "guilty of such a fraud upon the insurer of his life, that his representatives can not recover for this reason alone." HUNT, J., however, said of this case, in *Life Ins. Co. v. Terry*, 15 Wall. 586, that it was in this respect "confessedly unsound." The case, in its entirety, is not supported by the current of authority. It rules that an exception in the policy, expressed in the words, "should die by his own hands," must be severed and dissociated from other exceptions expressed in words involving the self-criminality of the assured; were to be construed by themselves, and imported "any sort of suicide," leaving it in doubt whether "suicide" expressed intentional, voluntary, or involuntary, accidental self-destruction.

A contract of life insurance is simpler in form, in the relative rights and duties of the insurer and the assured, and differs in many respects from marine, or from fire insurance; yet, the general principles applicable to marine, or fire insurance are applied, so far as consistent with the nature and obligations of the contract, to the contract of life insurance. In all contracts of insurance, there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property, or health, or life, is usually subject to, and the assured can not voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud, or the criminal misconduct of the assured is, in contracts of

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marine, or of fire insurance, an implied exception to the liability of the insurer.—*Waters v. Merchants' Louisville Ins. Co.* 11 Peters, 213; *Citizens' Ins. Co. v. Marsh*, 41 Penn. St. 386; *Chandler v. Worcester Mut. Fire Ins. Co.*, 3 Cushing, 328. Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It can not be in the contemplation of the parties, that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk, and hasten the day of payment of the insurance money.

The doctrine asserted in *Fauntleroy's case*, that death by the hands of public justice, the punishment for the commission of crime, avoids a contract of life insurance, though it is not so expressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the exception into policies. The same considerations and reasoning which support the doctrine, seem to lead, of necessity, to the conclusion, that voluntary, criminal self-destruction, *suicide*, as defined at common law, should be implied as an exception to the liability of the insurer, or, rather, as not within the risks contemplated by the parties, reluctant as the courts may be to introduce by construction or implication exceptions into such contracts, which usually contain special exceptions. An express contract to pay the insurance money to the assured, in the event he committed suicide, an increased premium being paid because of the risk, there could be but little, if any, hesitancy in repudiating as offensive to law and good morals. The fair and just interpretation of a contract of life insurance, made with the assured, is, that the risk is of death proceeding from other causes than the voluntary act of the assured, producing, or intended to produce it; and especially of a contract made by an association or organization, with one of its members, the objects and purposes of which is, that the members will contribute to, and bear each other's losses, or the losses of those dependent upon them. The extinction of life by disease, or by accident, not suicide, voluntary and intentional, by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime.—Bliss on Life Insurance, §§ 242-3.

The by-laws, or general law, adopted by the commandery, subsequent to the issue of the certificate, so far as it declares a forfeiture or avoidance of the certificate, in the event a member, who is sane, takes his life, is not objectionable upon the ground that it varies or impairs existing contracts. It adds no new term or condition to the contract; it relieves the associa-

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tion from no responsibility; it imposes no new or additional duty upon the member, and works no change in his relations. It is the mere declaration or expression of the implication of the law; and "the expression of those things which the law implies works nothing."—2 Parson's Contracts, 515. The law employs the phraseology (and the plea pursues it), not now of infrequent use in contracts or policies of life insurance, "take his own life." These words, when used in a policy of life insurance, have a known and definite legal signification, importing *suicide*; that the member must not become a *felo de se*; must not "deliberately put an end to his own existence, or commit any unlawful, malicious act, the consequence of which is his own death;" and this implies that he must be "of years of discretion, and in his senses."—4 Black. 189. Contracts of insurance, like other contracts, are interpreted so as to meet and satisfy the intention of the parties. Whatever may be the phrase employed, expressive of self-destruction, which is to operate a forfeiture, if not otherwise qualified or limited; whether it be "commit suicide," or "death by suicide," or "death by his own act," or "take his own life," or other equivalent expression, it would be most unreasonable to interpret it as including death by accident, or by mistake, though the direct, immediate act of the assured may have contributed to it. The firing of a weapon not supposed to be loaded, or its discharge not directed against, or intended to reach the person, may cause death. Poison may be taken instead of a curative medicine by accident or by mistake, and the accidents or mistakes from which death may result are innumerable. An extinction of life, unintentional, involuntary, will not fall within such expressions, intended to guard the insurer against the positive, intentional acts of the assured.—2 Parson's Contracts, 475; Bliss on Life Insurance, § 225; *Life Ins. Co. v. Terry*, 15 Wall. 580; *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. 567; S. C. 19 Amer. Rep. 623.

The plea, consequently, attaching to its words their known legal signification, when used in, or applied to contracts of life insurance, imports voluntary, intentional deprivation of self-existence by the assured while in his senses. The omission of the word *willful*, as descriptive of the self-destruction, did not render the plea demurrable. If that word had been added, or any similar word, evidence of an intentional, not of an accidental self-destruction, would have met the averment. Evidence of no other than an intentional act will satisfy the present averment. Such an act being shown, if it is intended to excuse it, because of the mental unsoundness of the assured at the time of its commission, the fact, the matter of excuse, ought to have been replied by the plaintiff. The presumption of law is in

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favor of sanity, and the burden of proving insanity rests upon the party alleging it.—Bliss on Life Ins. § 378; *Terry v Life Ins. Co.*, 1 Dillon (Cir. Ct.), 403; *Phadenhauer v. Germania Life Ins. Co.*, *supra*.

Policies of life insurance usually contain an exception of the liability of the insurer, in the event of the self-destruction of the assured. There is a contrariety of decision as to the effect of the exception; whether it embraces any and every act of intentional self-destruction, or only *suicide*, criminal self-destruction. The preponderance of authority points to the conclusion that it refers *solely to suicide*.—*Life Ins. Co. v. Terry*, *supra*; *Phadenhauer v. Germania Life Ins. Co.*, *supra*; *DeGogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232; Bliss on Life Ins. §§ 225-238.

With a view of excepting from the operation of the policy any intended self-destruction, whether the assured is *sane* or *insane* at the time of its commission, insurance companies are in the habit of inserting in policies a provision, the equivalent of that expressed in the law of the association now under consideration. The exception as to the insane has been supported, and it is said to be as much the right of the insurer to stipulate for exemption from liability in the event of intentional self-destruction by the insane, as to stipulate for an exemption from liability because the hazard of loss is increased from the fact of the assured engaging in occupations perilous to life, or taking up residence in an unhealthy climate.—*Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284. In this respect, the law adds a new term to the contract, relieves the association from an existing liability, and lessens the value and security of the certificate to the assured.

It is not claimed that there is an inherent power in the association, by the adoption of a by-law, to work such radical changes in its existing contracts. The power is derived from, and depends upon the stipulations of the contract at the time it was made. The stipulations are expressed in varying terms, and several of them import no more than would be implied—the observance by the assured of the requirements of the association, such requirements as were reasonable, and intended to promote the harmony of the association, and the purposes and objects for which it was formed. They import also obedience to the by-laws, so far as reasonable, consistent with the charter and law of the land. We do not construe them as reserving, or as intended to reserve to the association the power to change or avoid its contracts, to lessen its responsibilities, or to divest its members of rights. This is not the proper office of a by-law; and from the general expressions to which we are referring, it can not be fairly presumed or intended that it was contemplated to affect the members by other than such by-laws, as it was

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within the competency of the association to enact. But in addition to these, the averment of the plea is, that the certificate was accepted by the assured, "subject to the laws of the order now in force, or which may be hereafter enacted by the supreme commandery." These are words of large signification, and clearly express that the assured consented that the contract should be subject to future, as well as to existing by-laws. Parties may contract in reference to laws of future enactment—may agree to be bound and affected by them, as they would be bound and affected if such laws were existing. They may consent that such laws may enter into and form parts of their contracts, modifying or varying them. It is their voluntary agreement which relieves the application of such laws to their contracts and transactions from all imputation of injustice. An engagement of suretyship relating to a particular office, with prescribed duties, by the common law, extends only to such duties as are prescribed when the engagement is entered into, and not to such as, while the suretyship is continuing, may be attached to the office.—1 Chitty on Contracts (11th Am. Ed.), 765, *note*. The statute prescribing the condition of official bonds, and of the bonds of executors, administrators, and guardians, extends the liability of the surety to the performance by the principal of such duties as are required of him by existing laws, or by any law passed subsequent to the execution of the bond.—*Morrow v. Wood*, 56 Ala. 1. There is no injustice in the statute—nothing retrospective in its operation. The surety enters into the bond with knowledge of the condition, assenting that his liability may be enlarged, if public interest and convenience require that the official duties of the principal should be enlarged.

In consequence of the settled doctrine, that the charter of a corporation, whether private or eleemosynary, not instituted as part of the machinery of government, but for the private benefit or purposes of the corporation, is a contract between the State and the corporators, protected by the constitution of the United States from repeal, or alteration, or impairment by subsequent legislation, it has become usual, either by constitutional provision, or by a general law, or by reservation in the charter, to clothe the legislative power of the State with full capacity, at pleasure, to alter, modify, or repeal the charter. The power being reserved, its exercise can not of course be said to impair the obligation of the grant.—Ang. & Ames on Corporations, § 767; Cooley on Con. Lim. 340. The power is reserved by, and is a part of the grant, and that it may be exercised, is a condition upon which the grant of corporate existence and franchises is accepted.

The members of associations, created for purposes and ob-

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jects like those which seem to be the purposes and objects of this organization, may very properly be required to assent that the contract conferring upon them rights shall be subject to, and depend upon the future, as well as the existing laws adopted by the governing power. The fundamental principle of such organizations is the mutuality of duty and equality of rights of the membership, without regard to time of admission. This can not well be preserved, if the members stipulating for benefits were not required to consent that they would be subject to future as well as existing by-laws. Time and experience will develop a necessity for changes in the laws, and if the consent was not required, there would be a class of members bound by the changed laws, and a class exempt from their operation. The case before us is an illustration. Of the legality and propriety of the provision relieving the association from liability, if a member while insane deprived himself of life, there is no good reason to question. If no other reason could be given, that it relieves the association from litigating with the representatives of a deceased member the distressing question of his sanity, would be sufficient. If the law was applied only to certificates issued subsequent to its enactment, there would be a class of members having certificates of greater value than the certificates held by another class; yet each class would be subject to the same assessments and the same duties. There is but little room, if any, for the apprehension, that advantage will be taken by the governing body of the assent of the member to be bound and affected by subsequent laws, to impose upon him unjust burdens, or to vary the contract, save so far as an alteration or modification of it may be promotive of the general good. Subsequent or existing by-laws are valid only when consistent with the charter, and confined to the nature and objects of the association. While a subsequent law, because of the assent of the member, may add new terms or conditions to a certificate, terms or conditions reasonably calculated to promote the general good of the membership, and may be valid and binding, it does not follow that a law operating a destruction of a certificate, or a deprivation of all rights under it, would be of any force.—*Korn v. Mut. Ass'n Society*, 6 Cranch, 192.

Without pursuing the discussion of the question, we are of opinion that the parties intended the certificate should be subject to the laws of the association adopted subsequent to its issue—laws, which if they had been of force at the time of the issue, would have entered into, and formed part of it. It is the concurring assent of the parties, that engrafts the law upon the certificate, giving it an operation it would not have otherwise.

The Circuit Court erred in sustaining the demurrer to the plea, and its judgment is reversed and the cause remanded.

Horton v. Wollner, Hirshberg & Co.

Action on Contract by Employee against Employer.

1. *Statute of frauds; when contract within.*—A contract for labor or personal services for one year, to begin *in futuro*, is void under the statute of frauds, unless it, “or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing.”

2. *Contract entered into by correspondence; date of.*—When a contract is made by letters, offering and accepting a stated proposition, sent and received by mail, the date of the letter of acceptance is the date of the contract.

3. *Statute of frauds; contract not to be performed within one year.*—In order to take a contract for personal services for one year, to begin *in futuro*, without the statute of frauds, all its essential terms, including the amount of salary or compensation to be paid for such services, must be stated in the writing, with such degree of certainty as to render a resort to oral evidence unnecessary to an ascertainment of the intention of the parties.

4. *Same.*—It is not sufficient that such contract should state that the salary is to remain the same as that received for the previous year; as this renders a resort to verbal or extrinsic evidence necessary to ascertain the amount of the salary, thereby supplementing the contract in a way forbidden by the letter and spirit of the statute.

5. *Same; when void contract rebuts presumption of continuance of former contract.*—Where one, having been in the employment of another under a contract for one year, before the expiration of the term, makes a new contract for another year, which is void for want of conformity to the provisions of the statute of frauds, and in which the character of the services to be performed are changed, he can not recover upon an implied agreement that his employers would pay him the same salary which they had paid him for the previous year. In such case, the new contract, although void under the statute of frauds, destroys the implication of an intention to continue in force the old one.

APPEAL from the City Court of Mobile.

Tried before Hon. O. J. SEMMES.

This action was commenced on the 14th March, 1882, by E. F. Horton against Wollner, Hirshberg & Co., to recover damages for the breach of a contract made and entered into by them, whereby, as is averred, the defendants employed the plaintiff for the term of one year, to commence on the 22d August, 1881, at and for a stated salary; the alleged breach being that the defendants, in January, 1882, discharged plaintiff from their service without cause and without fault on his part. One of the defenses pleaded by the defendants was the statute of frauds. The cause was tried without a jury, and a statement of

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the evidence was signed by the presiding judge and made a part of the record.

The plaintiff was examined as a witness in his own behalf, and testified, in substance, that he had been in the employment of the defendants for about four years; that he was employed by them at a salary of \$1500 for the year commencing August 22d, 1880, and ending August 22d, 1881; that prior to the last named date, at the suggestion of Hirshberg, one of the firm, he wrote to Wollner, the senior member, who was then in Boston, for the purpose of making an arrangement for the then coming year, and about the 15th July, 1881, received from him a letter, dated at Allegany Springs, July 4th, 1881, and addressed to plaintiff. This letter was read in evidence, and, omitting the caption, address, and signature, was as follows: "Your favor to Boston reached me just about as I was leaving there; therefore delayed answering till I got here. Your services last year have been quite satisfactory, and we should like to retain you for the coming season. Since Martin has left our employ, we can give you a better chance as a salesman, and will employ an assistant to you to help at the store—therefore make your situation an easier and more advantageous one for you. As to the salary, I can not promise you an advance this year. I think, and am satisfied from the profits we make, that we are paying you all we can afford at present. Our expenses last year were too high; therefore, we made efforts to reduce them this year, and are of necessity compelled to keep them down as low as possible. We will give you the privilege to discount any of your customers' bills, as you proposed, which will give you an additional income. Should you conclude, or find it to your advantage to change your position for the coming season, you will oblige me by notifying me as soon as possible, to enable us to make other arrangements." The plaintiff further testified that on the 20th August, 1881, "he wrote defendants accepting the proposition offered by said letter." This letter, dated at Bay St. Louis, 20th August, 1881, and addressed to Wollner, Hirshberg & Co., was read in evidence, and, omitting date, address, and signature, is as follows: "As my engagement with you for the past year ends on 22d inst., I wish to inform you that the proposition you made in writing from Allegany Springs by your Mr. Wollner, relieving me from the packing, by hiring a competent man to do it, and giving me the territory formerly canvassed by Mr. Martin, as well as the territory now canvassed by me, is hereby accepted for the ensuing year."

The plaintiff further testified that from 22d August, 1881, he worked for defendants until 22d January, 1882, when he was discharged by defendants without cause; that from 22d August, 1881, up to the time of his discharge, he was paid at

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the rate of \$1500 a year, it being the same salary he received the year before; that he considered that he was working for a salary of \$1500, and was employed for a year from 22d August, 1881; but that from that date to the time of his discharge, nothing was said between him and defendants about said contract; that when he was discharged, he objected, and insisted that he had been employed for a year, but that defendants insisted that he had not been so employed; that he had been paid for the time he actually served defendants, but that such payment was not received in full settlement of their liability to him. Other testimony was introduced by the plaintiff, a statement of which is not necessary to an understanding of the opinion. The defendants introduced no testimony.

On demurrer to the plaintiff's evidence, a judgment was entered for the defendants, which is here assigned as error.

D. H. LAY, for appellant, cited Code, §§ 2121, 3104; 39 Ala. 64; 30 Ala. 175; Browne on Stat. Frauds, § 344a; 35 Ala. 453; 1 Brick. Dig. p. 857, §§ 769, 772; *Ib.* p. 859, §§ 786, 860; *Thomas v. Barker*, 37 Ala. 392; *Atwood v. Cobb*, 26 Am. Dec. 657; *Cowan v. Cooper*, 41 Ala. 187; *Corbin v. Sistrunk*, 19 Ala. 203; *Houston v. Townsend*, 12 Am. Dec. 109; *Benziger v. Miller*, 50 Ala. 206; *Parker v. Hollis*, 50 Ala. 411; *Crommelin v. Thiess*, 31 Ala. 419; *Hughes v. Williamson*, 35 Ala. 462.

MACARTNEY & CLARKE, *contra*.—(1) A contract for labor, not to be performed within a year, is within the statute of frauds.—Browne on Stat. Frauds, § 372; Wood on Mas. & Ser. § 188; *Scoggin v. Blackwell*, 36 Ala. 351. (2) There must be a memorandum of a completed contract, not simply a part of a pending treaty.—Browne on Stat. Frauds, § 371a; *Carter v. Shorter*, 57 Ala. 253. (3) And the essential terms of the contract must be stated in it, or in some other writing so connected with it as to be admissible, with such certainty that the court may gather all of them therefrom, without having recourse to parol proof.—3 Pars. Con. 17; 2 Kent's Com. 511; 1 Greenl. Ev. 268; Browne on Stat. Frauds, §§ 371 *et seq.*; Roberts on Frauds, §§ 105–6; *Boydell v. Drummond*, 11 East, 156; *Wellford v. Beazely*, 3 Atk. 503; *Wain v. Warlters*, 5 East, 10; *Bailey v. Ogdens*, 3 John. 399; *Abeel v. Radcliff*, 13 John. 297; *Peltier v. Collins*, 3 Wend. 459; *Wright v. Weeks*, 25 N. Y. 153; *Ridgway v. Ingram*, 50 Ind. 145; *Adams v. McMillan*, 7 Port. 73; *Knox v. King*, 36 Ala. 367; *Carrol v. Powell*, 48 Ala. 298; *Carter v. Shorter*, 57 Ala. 258; *Jenkins v. Harrison*, 66 Ala. 345. (4) Waiving the question whether the *character* of the service to be rendered by the appellant can be sufficiently gathered from the writing, read in the light of the circum-

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stances surrounding the parties at its date, it is clearly defective in not stating the *term*.—Wood on Mas. & Ser. § 195; *Palmer v. M. & P. R. M. Co.*, 32 Mich. 274; *Tuttle v. Swett*, 31 Me. 555; Browne on Stat. Frauds, § 385. (5) The *price* is not sufficiently stated in the writing.—Wood on Mas. & Ser. § 195; *Palmer v. M. & P. R. M. Co.*, *supra*; *Carter v. Shorter*, *supra*; *Adams v. McMillan*, *supra*; *Phillips v. Adams*, 70 Ala. 373. See, also, Browne on Stat. Frauds (4th Ed.), §§ 350, 375, 383; *Grafton v. Cummings*, 99 U. S. 100. This latter case explains *Beckwith v. Talbot*, 95 U. S. 289, and seems to favor the principle laid down in dissenting opinion in *Salmon Falls Manf. Co. v. Goddard*, 14 How. 446. (6) *Atwood v. Cobb*, 16 Pick. 227, relied on by appellant, criticised and discussed. (7) The burden was on plaintiff to show a sufficient written contract.—Browne on Stat. Frauds, §§ 511, 515; 1 Brick. Dig. 869, § 922. His own evidence showed the agreement to be void. *Flinn v. Barber*, 64 Ala. 193. And had the case been left to a jury, the court should have charged them directly on the evidence to find for the appellees.—*Rigby v. Norwood*, 34 Ala. 129. This being the case, it was bound to give defendants judgment on the demurrer to the evidence. (8) The part performance of the contract did not take the case out of the statute.—Wood on Mas. & Ser. § 192; Browne on Stat. Frauds, § 451; 2 Ch. on Con. (11th Amer. Ed.) § 842, note 5; *Hill v. Hooper*, 1 Gray (Mass.) 131; *Drummond v. Burrell*, 13 Wend. 307; *Scoggin v. Blackwell*, 36 Ala. 351. (9) That the continued services were to be rendered for the same period and upon the same terms as under the previous contract, would have been a legal presumption, had there been no new contract, and had the services remained of the same character.—*Crommelin v. Thiess*, 31 Ala. 412; Wood on Mas. & Ser. § 96; *Ranck v. Albright*, 36 Penn. St. 367–71; *Smith v. Velie*, 60 N. Y. 106. The continued services under the void agreement was one merely at will.—*Crommelin v. Thiess*, *supra*; *Parker's Adm'r v. Hollis*, 50 Ala. 411. (10) The English rule, that a general hiring is a yearly hiring, is not followed in this country; but here any hiring, indefinite as to time, is a mere hiring at will, and may be put an end to at any time by either party.—Wood's Mas. & Ser. §§ 131, 134; 106 Mass. 56; 113 Mass. 187; 3 Col. 142; 24 Mich. 115; 1 Cal. 450; 46 Penn. St. 426; 5 N. H. 294; 29 Penn. St. 184; 36 Penn. St. 367; 16 Conn. 246.

SOMERVILLE, J.—Under the provisions of the statute of frauds, as adopted in this State, “every agreement which, by its terms, is not to be performed *within one year* from the making thereof,” is declared to be void, “unless such agreement, or some note or memorandum thereof, *expressing the considera-*

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tion, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing."—Code, 1876, § 2121.

That a contract for labor, or personal services, if not to be performed within a year, falls within the influence of this statute, is well settled, and can admit of no question.—*Scoggin v. Blackwell*, 36 Ala. 351; 2 Parson on Cont. (6th Ed.) *45. Where, therefore, one is employed for a year's service, to begin *in futuro*, the agreement is void, if merely oral, and the employee can not maintain an action on it against the employer, or master, for discharging him before the expiration of the year. 2 Whart. Ev. § 883; *Scoggin v. Blackwell*, *supra*; *Dickson v. Frisbee*, 52 Ala. 165; *Treadway v. Smith*, 56 Ala. 345.

The contract which is the basis of the present action, consists of a correspondence by letter. It must be regarded as having been entered into on the 20th of August, 1881, the date of the plaintiff's letter accepting the proposition which the defendants had made to him. Inasmuch as the time of service is claimed to be for the period of one year, and was not to begin until the 22d of August, 1881, it is manifest that no recovery can be had upon the contract, unless it conforms to the requirements of the statute of frauds.

It is no objection, of course, that the written evidence, adduced to establish the alleged contract, is a correspondence of the parties by letters, provided these documents are so connected together by mutual reference, or otherwise, as to leave no ambiguity or uncertainty touching their legal effect and meaning, when taken together and construed as a whole.—3 Parson on Cont. 17; Browne on Stat. Fr. § 346. But the contract, or intention of the parties, as said by Mr. Greenleaf, "must *all* be collected from the *writings*; verbal testimony not being admissible to supply any defects or omissions in the written evidence. For the policy of the law is to prevent fraud and perjury, by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever."—1 Greenl. Ev. § 268. This rule does not, however, exclude proof of surrounding circumstances in aid of construction, at least in a certain class of cases to which the present does not belong.—*Jenkins v. Harrison*, 66 Ala. 345; 1 Addison on Cont. § 213. Parol evidence is often admitted to aid the identification of the subject-matter.—Fry on Spec. Perf. *166; *Mead v. Parker*, 115 Mass. 413; S. C. 15 Amer. Rep. 110; *Ellis v. Burden*, 1 Ala. 458; *Chambers v. Ringstaff*, 69 Ala. 140.

The main point of objection here taken is, that it nowhere appears in the correspondence what was the *amount of salary or compensation* which the defendants are alleged to have prom-

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ised to pay the plaintiff for his services. The general rule certainly requires that all the essential terms of the contract shall be substantially stated in the writings of the parties, with such degree of certainty, as to render a resort to oral evidence unnecessary in order to ascertain the intention of the parties. A detail of particulars, however, is not required—only a *note* or *memorandum* of their agreement in general terms.—*Holmes v. Evans*, 12 Amer. Rep. 372; *Sears v. Brink*, 3 Amer. Dec. 475; 1 Addison on Cont. § 213. The consideration agreed to be paid by the party sought to be charged, is made by the statute one of the terms necessary to be stated in the writing which he subscribes. The agreement is not only required to be in writing, but it must express the consideration.—Code, § 2121; *Rigby v. Norwood*, 34 Ala. 129. It has been repeatedly held that, under this statute, a contract for the sale of lands, which fails to state the *price* agreed to be paid by the vendee, is void and can not be enforced against him, “unless,” as the statute provides by way of exception, “the purchase-money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller.”—*Phillips v. Adams*, 70 Ala. 373; *Carter v. Shorter*, 57 Ala. 253; *Adams v. McMillan*, 7 Port. 80. The same rule must apply to all other agreements which come within the statute. It is not, in our opinion, sufficient for the agreement to state that the salary was to remain the same as that received the year previous. This is not expressing the consideration in the writing, which the statute requires. Such writing can not be made complete by resorting to verbal or extrinsic evidence, for this would be to supplement the contract in a way forbidden by the very letter and spirit of the statute of frauds. If one term of the contract can be thus supplemented, why not another? and if another, where is to be the limitation of the rule? “The statute can not be complied with,” says Mr. Waterman, “by a writing which *refers to a verbal agreement*, whether that agreement is subsisting, or to be made afterwards.”—Waterman on Spec. Perf. § 233; *Hyde v. Cooper*, 13 Rich. Eq. (S. C.) 250. It has been accordingly adjudged, that a memorandum, defective under the statute of frauds, could derive no aid from printed handbills and newspaper notices exhibited by the defendant at the time of sale, and stating the terms of sale.—*O'Donnell v. Leeman*, 43 Me. 158.

The tendency has been too great, perhaps, on the part of the courts to construe away the wise provisions of this salutary statute, by creating exceptions, designed to mitigate the rigor of its application to supposed hard cases. All admit it to be impossible to harmonize these numberless conflicting decisions. This court has announced its indisposition to further relax the operation of the statute to meet the necessities and equity of particu-

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lar cases.—*Jenkins v. Harrison, supra*, p.360. The strict enforcement of its requirements would seem to be a matter of imperious and increasing necessity, in view of the growing tendency of recent legislation to enlarge the competency of witnesses. The danger of frauds and perjuries, for the prevention of which the statute was enacted, has been greatly aggravated by this removal of important barriers to the qualification and competency of witnesses. The caution of the courts should be commensurate with the necessity of correcting, as far as possible, the admitted evils of the existing system.

It is insisted that, even if the contract under consideration is void for want of conformity to the statute of frauds, a recovery can still be had upon an *implied agreement*, that the defendants would continue to pay plaintiff the same salary which they had paid him for the year previous. Such might be the case, perhaps, in view of plaintiff's remaining in the service of the defendants, had there been no new contract, and had the character of the services to be performed remained unchanged.—*Parker v. Hollis*, 50 Ala. 411. But this presumption is destroyed by the fact, that another contract is put in evidence, essentially different from the original one in many of its terms and conditions. And this new contract, although void under the statute of frauds, has been held by this court to be competent to destroy the implication of any intention to continue in force the old one.—*Crommelin v. Thiess & Co.*, 31 Ala. 412.

We discover no error in the ruling of the court below, sustaining the defendants' demurrer to the evidence introduced by the plaintiff, and the judgment is affirmed.

Lehman, Durr & Co. v. Ferrell.

Claim Suit for Horse taken under Execution.

1. *Act of December 8th, 1880 construed; character of lien thereunder.* The act approved Dec. 8, 1880 (Acts, p. 260), makes it unlawful for the owner of certain named stock to voluntarily permit such stock to go at large off his premises in designated portions of Montgomery county, and provides that he shall be liable to every person injured for all damages done by the stock, when at large, to fruit or shade trees, shrubbery or crops, and further provides that a judgment obtained for such damages "shall be a lien on the stock causing such injury, in addition to other liens which an execution on such judgment may have according to law." *Held*, that the lien thereby provided for does not arise by operation of law from the act done, or the injury sustained, but depends upon the subsequent reduction of the claim to judgment.

2. *Extent of lien thereby provided.*—Such lien can only be commensu-

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rate with the ownership of the person by whose voluntary permission the stock was at large; and hence, it is subordinated to the lien of a prior recorded mortgage, executed by such owner.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JAMES E. COBB.

The nature of the case, and the facts disclosed by the evidence are sufficiently stated in the opinion. At the written request of the plaintiff, Ferrell, the court charged the jury that if they believed all the evidence, they must find the issue in favor of the plaintiff, and the horse in controversy liable to the satisfaction of his execution. To this charge the claimants, Lehman, Durr & Co., excepted, and here assign the same as error.

E. P. MORRISSETT, and CLOPTON, HERBERT & CHAMBERS, for appellants.

J. M. FALKNER, *contra*.

STONE, J.—The single question raised by the record, and to which the arguments of counsel are directed, is, whether or not the lien given by the act of 1880–81, approved December 8th, 1880 (Acts 1880–81, p. 260), entitled “An act to prohibit the owner of any horse, mule, ass, cow, hog, sheep, or goat, from allowing any such animal to go at large off the premises of such owner in Montgomery county, except certain portions enumerated and defined herein, and to prescribe a rule of damages, and rules of practice in cases arising under this act,” is superior to, and overrides the lien of a mortgagee, under a prior recorded mortgage.

The appellee, Ferrell, brought suit before a notary with justice powers, for damage done by the stock of one Ballard. A judgment was rendered by the notary in favor of the plaintiff, the concluding sentence of which is in these words: “And a lien is hereby created by statute upon the stock doing such damage.” The appellants then interposed a claim to the property, a horse, upon which the execution was levied, which claim was not sustained by the notary, and an appeal was taken to the Circuit Court. In the Circuit Court an issue was made up between the plaintiff in execution, and the claimants, appellants here. The plaintiff in execution made proof of the fact that the horse upon which the execution was levied, was the identical animal which committed the trespass complained of, and for which judgment was rendered by the notary under section 1 of the above mentioned act. The claimants proved that said Ballard was indebted to them on February 16th, 1881, and on that day, which was prior to the damage complained of, he executed to them

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a mortgage upon the horse upon which the execution was levied, together with other property; that the mortgage was duly recorded, and has never been paid.

The first section of the act declares: "That from and after the passage of this act, it shall not be lawful for the owner of any horse, mule, ass, cow, hog, sheep, or goat, in that part of the county of Montgomery as hereinafter set forth, voluntarily to permit any such animal to go at large off the premises of such owner, and the owner of any such animal, so permitted to go at large, shall be liable to any party injured thereby for all damages done to the fruit or shade trees, or ornamental shrubbery, or crops, of any person or persons, to be recovered before any court of competent jurisdiction; and the judgment of the court, when against the owner of any such stock so depredating, shall be a lien on the stock causing such injury, in addition to other liens which an execution issued on such judgment may have, according to law."

It will be observed that the statute gives no lien, attaching upon the commission of the trespass, nor upon the injury sustained by the person upon whose property the trespass is committed. The lien does not arise by operation of law from the act done, or the injury sustained, but depends for its ascertainment upon the subsequent reduction of the claim to judgment; when, in the language of the statute, "the judgment of the court, when against the owner of any such stock so depredating, shall be a lien upon the stock causing such injury." Can the lien of a judgment be superior to that of a prior recorded mortgage?

Before the Code of 1852, there was a lien upon the lands of the defendant from the rendition of the judgment.—*Morris v. Ellis*, 3 Ala. 560; *Campbell v. Spence*, 4 Ala. 543; *Daily v. Burke*, 28 Ala. 328. Under this law it was held that "the lien of the judgment must necessarily be subject to the equities already existing over the property."—*Goster v. Bank*, 24 Ala. 37. Mr. Freeman in his work on Judgments, in discussing the lien of judgments, uses this language: "Whenever a lien attaches to any parcel of property, it becomes a charge upon the precise interest which the judgment debtor has, and no other. The apparent interest of the debtor can neither extend nor restrict the operation of the lien, so that it shall incumber any greater or less interest than the debtor in fact possesses.—Freeman on Judg. § 356; *Walke v. Moody*, 65 N. C. 599; *O'Rourke v. O'Connor*, 39 Cal. 442; *Churchill v. Morse*, 23 Iowa, 229; *Filley v. Duncan*, 1 Woolworth (Neb.), 134.

The language of the statute must exert a controlling influence in its interpretation. "Voluntarily to permit any such animal to go at large off the premises of such owner," is the language

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employed by the legislature. That is the offense against good neighborhood, which the statute was intended to prevent or deter, by the imposition of damages, and by giving a lien not conferred by the general law. This marked privilege, given as a means of enforcing such recoveries, evidently owes its birth and existence to the disregard of social duty, shown by voluntarily permitting the injury to be done. Damage done by stock going at large, without more, does not entitle the party injured to maintain the action and enforce the lien. To incur the penalty, the damage must be done by a horse, mule, etc., which the owner voluntarily permits to go at large off his premises.

The foregoing being the proper necessary interpretation of the statute, we think the lien the statute gives on the stock doing the damage, can only be commensurate with the ownership of the person, by whose voluntary permission the stock runs at large.

Ballard was the person sued, by whose voluntary permission it is charged the horse was at large. The lien can only extend to such title and interest as he was the owner of.

From what we have said above, it follows that the judgment of the Circuit Court must be reversed, and the cause remanded.

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Scire Facias to revive Judgment.

1. *Trial of issues of fact by the court; special finding, when open for review in appellate court.*—Where, by agreement of parties, a jury is waived in a civil case, and the issues of fact are tried and determined by the court under the statute (Code, §§ 3029-31), and, at the request of one of the parties, the court makes a special finding, the sufficiency of such finding is open for review on appeal to this court.

2. *Same; what necessary to support special finding.*—Like a special verdict, such special finding can not be aided by intendment, or by reference to extrinsic facts, but it must directly and affirmatively find every fact in issue, essential to the right of recovery, or judgment upon it can not be pronounced; but it must be confined and be responsive to the issue; and so far as it may pass beyond the issue and find facts either confessed or not denied, it is *pro tanto* impertinent and bad.

3. *Same; when fact not in issue need not be found.*—Hence, where, in a proceeding by *scire facias* to revive a judgment after the lapse of ten years without the issue of an execution, a special finding was made by the court, in the absence of a plea of payment or an issue touching the satisfaction of the judgment, such finding is not insufficient because it fails to find that the judgment had not been satisfied, although, under the statute, the judgment must be presumed to be satisfied, and the

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burden of proving that it was not, is thereby made to rest upon the party seeking to revive.

4. *Scire facias*; can not be defended for errors behind the judgment.—A *scire facias* to revive a judgment can not be defended because of matters going behind the judgment, or of errors in the course of proceedings leading to its rendition; and hence, the failure to file a complaint in a suit commenced by an attachment, although an irregularity for which, on appeal, a judgment by default would be reversed, is no defense to a proceeding by *scire facias* to revive the judgment recovered in that suit.

5. *Complaint in attachment suit; evidence of filing*.—While the endorsement of the fact of filing a complaint in an attachment suit by the clerk is conclusive evidence that it was filed, at any time after judgment, it is not, either before or after judgment, the exclusive evidence of that fact; but when the complaint is found with the original file of the papers in the cause, from which it must be transcribed when the final record is made up, forming part of it, and there is no countervailing proof, the fact of filing is satisfactorily shown.

6. *Judgment against garnishee; what errors thereby cured*.—The appearance and answer of a garnishee, without objection, cures whatever of defect or irregularity there may have been in the writ or summons, and the judgment thereafter rendered is conclusive upon him.

7. *Levy of attachment by service of garnishment; effect of; irregularities in garnishment can not affect validity of judgment*.—In attachment jurisdiction may be acquired by service of garnishment on defendant's debtor, which will be as full and complete as could have been acquired by a levy of the attachment on real estate, or on visible, tangible chattels, capable of manual seizure; and the garnishment being merely incidental and auxiliary to the attachment, errors intervening therein can not affect the validity of the judgment rendered against the defendant.

8. *Attachment; a personal proceeding*.—A suit commenced by attachment is not a proceeding *in rem*, but is personal against the defendant; and the judgment therein authorized is not merely one of condemnation of the property attached, but is personal and general, as in a suit commenced by summons and complaint.

9. *Notice essential to judicial proceedings operating upon parties personally*.—While notice is an essential element of all judicial proceedings which are to operate upon parties personally, and can not be dispensed with by legislative enactment, such notice need not be personal; it is enough, if it is fairly and reasonably probable that the notice prescribed by the legislature will apprise the party proceeded against of the pendency of the suit, and of the consequent necessity for his appearance to make defense, if he is unwilling to submit to judgment.

10. *Statutes authorizing judgments in attachment suits without personal notice valid*.—Hence, the statutes of this State, as they formerly existed; authorizing personal judgments against defendants in suits commenced by attachment, without other notice than the levy of the attachment on the property or effects of the defendant gave, were consistent with the constitution; and judgments rendered therein, as between citizens of, and as to property found in, this State, were of the same force and effect, when drawn in question collaterally, as if they had been rendered on personal service.

APPEAL from City Court of Mobile.

Tried before Hon. O. J. SEMMES.

Scire facias by George Eberlin, as the administrator of the estate of M. D. Eslava, deceased, against Manuel Betancourt, commenced on 13th March, 1882, for the purpose of reviving a judgment which the said decedent recovered against Betan-

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court in said court on 13th April, 1868, a part of which was averred to be unsatisfied; and of having an execution issued for the collection thereof. The defendant resisted the revival of the judgment and issue of execution on the following grounds: (1) "It appears of record in said cause that said City Court had no jurisdiction of said cause, because no complaint was ever filed therein." (2) "Defendant further says that it appears of record that said court did not have any jurisdiction to render a judgment for any sum beyond the value of the property garnisheed, because defendant was not served with any notice of said proceedings, and did not appear therein." (3) "Because it appears of record in said cause, that no execution could be issued against defendant upon said judgment, no notice of the proceedings upon which said judgment was rendered having been served upon him, and he not having appeared therein." By agreement of parties, a jury was waived, and the issues of fact were tried and determined by the court, without the intervention of a jury, under §§ 3029-31 of the Code; the court, at the request of the defendant, making "a special finding of the facts at issue between the parties."

This finding was, in substance, that the suit in which the judgment sought to be revived was recovered, was commenced on 11th November, 1865, by attachment sued out of said court by the said Eslava against the defendant, on the ground that the defendant had money or effects liable to satisfy his debts, which he fraudulently withheld; that this attachment was levied by service of "a summons of garnishment in attachment," on John J. Lazo and John Guizon; that on 1st December, 1865, one John B. Guizon filed an answer, under oath, purporting to be the answer of J. J. Lazo & Co., "garnishees in this cause," to said garnishment, in which he describes himself as a member of said firm, and in which an indebtedness of \$340 is admitted; that a subsequent answer was afterwards filed by one Peres, recited to be a member of the firm of J. J. Lazo & Co., in which a notice was given that a third party living in Louisiana claimed to be the owner "of the fund previously answered to be due by said Lazo & Co. to Manuel Betancourt;" but that this answer has no endorsement thereon, showing that it had been filed. The court further found, in substance, that the claim to the fund suggested in the answer was never prosecuted, though notice was duly given; that a complaint was found among the papers in the original cause, but that it had no endorsement thereon, indicating that it had been filed; and that at the March term, 1868, judgment was rendered on verdict for the plaintiff against the defendant for \$600.05, and the judgment-entry is made a part of the finding. This entry recites that the attachment "was levied on property

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of the defendant in the hands of J. J. Lazo & Co." It is further found that a judgment against the garnishees on their answer, for the amount admitted therein, was subsequently and on the same day rendered against the garnishees; that no executions were issued on either of said judgments, but that the garnishees paid \$280, which was credited on the judgment against the defendant; that "no levy of said attachment was made other than by serving said summons of garnishment upon said John J. Lazo and John Guizon, as shown above; and that no personal service of any of said proceedings was made upon the defendant; that no personal notice of said proceedings was ever given to said defendant, and that no notice of any kind, except such as the law may infer from the facts hereinbefore found, was ever given to defendant; and that the defendant did not appear in said cause, either in person or by attorney."

Upon this finding the court revived the judgment, and ordered execution to issue for its satisfaction. The defendant excepted to "the sufficiency of the facts found to support the judgment;" and he here assigns as error the finding of the court and the judgment rendered thereon.

J. L. & G. L. SMITH, for appellant, cited Code of 1876, § 3174; Cooley on Con. Lim. pp. 398, 402-4; *Shapard v. Lightfoot*, 56 Ala. 506; *Moore v. Burns & Co.*, 60 Ala. 269; *Little v. Fitts*, 33 Ala. 343; *Calhoun v. Fletcher*, 63 Ala. 584; *Zeigler v. S. & N. R. R. Co.*, 58 Ala. 599; *Wilburn & Co. v. McCalley*, 63 Ala. 443; *Mead v. Larkins*, 66 Ala. 87; *Comer v. Jackson*, 50 Ala. 385; *Brown v. Wheeler*, 3 Ala. 389; *Cooper v. Reynolds*, 10 Wall. 315; Drake on Att. § 5; *Pennoyer v. Neff*, 5 Otto, 714; *Kilburn v. Woodworth*, 5 John. 40; *Letondal v. Huguenin*, 26 Ala. 552.

P. HAMILTON and S. P. GAILLARD, *contra*, cited 26 Ala. 552; 43 Miss. 161; 6 Ir. (N. C.) 448; 4 Sneed, 196; 2 S. & M. 593; *Zeigler v. S. & N. R. R. Co.*, 58 Ala. 599; *Hoke v. Henderson*, 4 Dev. (Law) 16; *Dorman v. State*, 34 Ala. 231; 3 Kern. 391; 15 N. Y. 303; Story on Con. § 1943; 63 Ala. 436; Cooley on Con. Lim. (4th Ed.) 437; *Taylor v. Woods*, 52 Ala. 477; *S. & N. R. R. Co. v. Morris*, 65 Ala. 193; *Sadler v. Langham*, 34 Ala. 311; *Norman v. Heist*, 5 W. & S. (Pa.), 171; 104 U. S. 78; *Ib.* 783.

BRICKELL, C. J.—Prior to the enactment of the present statute, if it was not the duty of the court to try and determine the facts, if in the regular and usual course of procedure they should have been submitted to a jury for determination, and the parties waiving the intervention of a jury, submitted them

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for decision to the court, the decision was not examinable on error—it was final and conclusive.—*Etheridge v. Malempre*, 18 Ala. 565; *Barnes v. Mayor*, 19 Ala. 707; *Bott v. McCoy*, 20 Ala. 578; *De Vendell v. Hamilton*, 27 Ala. 156; *Stein v. Jackson*, 31 Ala. 24. Parties are authorized by the statute, in civil cases in courts of common law jurisdiction, to waive the intervention of a jury and submit the issue of fact the case may involve to trial and determination by the court. The finding of facts may be general or special at the discretion of the court, unless one of the parties should request a special finding. Whether the finding is general or special, it has the same effect as the verdict of a jury, and if special, its sufficiency to support the judgment is open for review in an appellate court.—Code of 1876, §§ 3029-31. When the finding is special, the statute operates to open for examination the sufficiency of the facts as found to support the judgment, and casts upon an appellate court the duty of reviewing and examining the decision of the primary court upon them. The finding in the present case was special, on the request of the appellant, the defendant in the court below, and whether the facts as found, reduced to writing and entered on the minutes, will support the judgment rendered, must be inquired into and determined.

The insufficiency of the special finding is questioned first, because it is silent as to the satisfaction of the judgment sought to be revived. Assimilating the special finding to a special verdict of a jury, we incline to the opinion that the objection would be well taken, if the satisfaction of the judgment had been an issue of fact submitted for the decision of the court. A special verdict must find directly and affirmatively every fact in issue essential to the right of recovery, or judgment upon it can not be pronounced; it can not be aided by intendment or by reference to extrinsic facts. But the verdict of a jury, whether it is general or special, must be confined and responsive to the issue. So far as it may pass beyond the issue and find facts either confessed or not denied, it is impertinent and bad *pro tanto*.—10 Bac. Ab. 353; *Lee v. Campbell*, 4 Port. 198; *Sewall v. Glidden*, 1 Ala. 52. The issues of fact in the case were presented by special pleas, but no one of them was directed to, or involved the inquiry whether the judgment was satisfied or unsatisfied. The statute declares that if ten years elapse without the issue of execution, a judgment must be presumed satisfied, and the burden of proving that it is not, that it remains unpaid, rests upon the party seeking its revival.—Code of 1876, § 3174. If there had been a plea of payment, or any issue touching the satisfaction of the judgment, the points argued by counsel would arise. But in

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the absence of such issue, the court could not determine or pass upon the fact of satisfaction. It was proper to observe, in reference to the fact, the silence which the parties had observed.

The first plea assails the jurisdiction of the court to render the judgment of which revival is sought, upon the ground that a complaint was not filed in the original action. The plea is upon its face bad. If the fact is, that in the original suit the court proceeded to final judgment without requiring the plaintiff to file a complaint, a statement in writing of the cause of action, standing in our practice in lieu of a declaration at common law, it was mere irregularity, for which on error a judgment by default would be reversed. But it was mere irregularity, not affecting the validity of the judgment when collaterally assailed. A *scire facias* for the revival of a judgment can not be defended because of matters going behind the judgment, or of errors in the course of proceedings leading to its rendition. If the court had jurisdiction, the judgment imports absolute verity. — *Miller v. Shackelford*, 16 Ala. 95; *Duncan v. Hargrove*, 22 Ala. 150. Whether, if the facts found specially would not support the conclusion of the City Court, that a complaint was filed in the original action, the judgment, if in other respects correct, would be disturbed, we need not decide. The conclusion of the City Court is manifestly right and proper. The want of endorsement upon the complaint by the clerk of the fact of its filing is a clerical omission. Such an endorsement would have been conclusive evidence of the fact of filing, at any time after the proceedings had ripened into judgment. But it is not, before or after judgment, the exclusive evidence of the fact. When there is no countervailing evidence, and the complaint is found with the original file of the papers in the cause, from which it must be transcribed when the final record is made up, forming part of it, the fact of filing is shown satisfactorily.

It may appear that the garnishment was irregular, that it did not with certainty set out the names of the garnishees, or properly describe them as partners, and for this reason, on timely application, would have been quashed at their instance. But in obedience to it, they appeared and answered, admitting an indebtedness to the defendant in attachment. The appearance and answer, without objection, cured whatever of defect or irregularity there may have been in the writ or summons of garnishment. The appearance of a party, without objection, is a waiver of defects or irregularity in the process issuing to him, and the judgment thereafter rendered is conclusive upon him. The proceeding was merely incidental and auxiliary to the proceedings and judgment against the defendant in attach-

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ment, and errors intervening in the proceeding can not affect the validity of the judgment rendered against the defendant. Jurisdiction was acquired by the service of the garnishment, as full and complete as could have been acquired by a levy of the attachment on real estate, or on visible, tangible chattels, capable of manual seizure.—Code of 1876, § 3268; *Thompson v. Allen*, 4 St. & Port. 184; *Tillinghast v. Johnson*, 5 Ala. 514; *Cleaveland v. State*, 34 Ala. 254. It is an elementary principle, that a judgment rendered by a court having jurisdiction, not drawn in question on error, is final and conclusive between the parties and their privies, though the record may abound with errors or irregularities.

The proceeding by attachment is not, as is insisted by the appellant, a proceeding *in rem*; nor is it a mere judgment on condemnation of the thing attached the court is authorized to render. The suit is personal against the defendant, against him, not against the *res*; the complaint is filed in the same form, with the same and no other averments than are sustained when he has been personally served with summons to appear and answer; and the suit is subject to suspension or abatement because of intervening personal disabilities. The attachment, if the leading, is essentially original process; the commencement of suit is reckoned from its levy, and, while pending, it may be pleaded in abatement of a subsequent suit for the same cause of action. *Dean v. Massey*, 7 Ala. 601. The judgment rendered is personal and general, that the plaintiff have and recover of the defendant. There has been in practice no distinction observed, nor do the statutes contemplate or require that the distinction should be observed, in the form of judgment rendered in suit commenced by attachment and in a suit commenced by summons. At his election, the plaintiff may sue out upon the judgment a *venditioni exponas* for the sale of the property attached, or a *feri facias* which may be levied on that property, or on any other effects of the defendant.—*Garey v. Hines*, 8 Ala. 837. It is apparent the statutes intend an attachment, when the original process, shall serve a double purpose, first, giving notice to the defendant, affording him the opportunity to appear and defend; secondly, the creation of a lien upon the thing attached, furnishing security to the plaintiff, if he succeeds in obtaining judgment. The judgment rendered originally is in the form of, and has the same legal effect as, the judgments which it has been the practice of the courts to render in suits commenced by attachment, and is not void or irregular.

It is further insisted by the counsel for the appellant, that the City Court was without jurisdiction to render the original judgment—that it is *coram non iudice*, because rendered without *personal notice* to the defendant, or notice otherwise than by

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the service of the garnishment. This proposition is near akin to that we have just considered. A judgment or decree is not obligatory, unless the court rendering it has jurisdiction of the subject-matter, and of the parties to be bound or affected. Notice is an essential element of all judicial proceedings which are to operate upon parties personally.—*McCurry v. Hooper*, 12 Ala. 823; *Eslava v. Lepretre*, 21 Ala. 504. It can not be doubted that it is within the scope of legislative power to prescribe the mode of bringing parties before the courts of the State—the mode of giving notice to them of the pendency of judicial proceedings in which they may have rights and interests involved. Whatever may be the extra-territorial operation of such regulations, though they may not be operative as to the citizens of other States, yet, they are binding upon the citizens of the State in which they are enacted, and affect all property found within its jurisdiction. Notice can not be dispensed with by legislative enactment. A statute which would authorize a judgment or decree upon proceedings purely *ex parte*, would be violative of the constitution and void. But it is quite a mistake to suppose the notice must of necessity be *personal*, given by the personal service of process citing the party to appear and defend. It is enough, if it is fairly and reasonably probable that the notice prescribed will apprise the party proceeded against of the pendency of the suit, and of the consequent necessity for his appearance to make defense, if he is unwilling to submit to judgment.—*Empire City Bank*, 18 N. Y. 215. There are many exceptional cases, in which a species of notice denominated *constructive*, as distinguished from *actual* notice, the notice given by personal service of process, is authorized by statute. In these cases, there would be indefinite delays in the administration of justice, the equivalent of a denial of justice, if some other mode of notice than the personal service of process was not authorized. In these cases, the legislative power must elect between the evils of delaying, or denying, or embarrassing the administration of justice, and the opposite evils of the probability or possibility of a judgment or decree rendered upon an *ex parte* hearing. The requirements of the constitution are satisfied, if the mode of notice prescribed is adapted to inform the parties to be affected of the pendency of the proceedings, giving them opportunity to appear and defend.

From the earliest existence of organized government here to the present time, we have had statutes authorizing the commencement of suits at law, in particular cases, by attachment of the property or effects of the defendant, and their prosecution to final judgment, which within the State would bind the defendant personally, and would be of the same effect and dignity,

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as it would have been, if rendered upon the personal service of process. If the attachment was not sued out because of the residence of the defendant without the State, it is only within the last few years, since the rendition of the judgment now assailed, that any other notice was required than such as is imputable from the levy of the writ. The statutes have proceeded upon the reasonable and just presumption, that the owner has actual or constructive possession of his property and rights or credits, which can not be disturbed by a seizure or levy of legal process, without his knowledge, or without information coming to him, if he is ordinarily diligent in reference to his own interests. The seizure or levy will consequently operate as notice to him of the pendency of the suit, and afford him full opportunity to appear and defend. The validity of the statutes, and of judgments rendered in pursuance to them, has not heretofore been questioned, though numerous cases have been before the courts in which the judgments rendered are nullities, if the statutes are violative of the constitution. The case must be clear, there must be no room for doubt, before a court could now pronounce the statutes and judgments rendered under them inoperative and void. We do not doubt that the statutes are consistent with the constitution, and that judgments rendered in proceedings had under them, as between our own citizens, and as to property found in the State, are of the same force and effect, when drawn in question collaterally, as if they had been rendered upon personal service of the most formal process.—*Miller v. Pennington*, 2 Stew. & Port. 399; *Bigger v. Hutchings*, *Ib.* 445.

We find no error in the record, and the judgment of the City Court must be affirmed.

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Action on Promissory Note.

1. *Bankruptcy; effect of on bankrupt's property.*—A bankrupt, by the adjudication of bankruptcy, becomes incapable of enforcing, in his own name, any property rights which belonged to him at the time of the adjudication; but upon the appointment of an assignee by the bankrupt court, and the execution and delivery of an assignment to him, all the property rights of the bankrupt, except such as were specially excepted from the operation of the bankrupt act, vest in the assignee, with the exclusive right to sue for the same.

2. *Same; effect of on husband's right to sue for rents of lands belonging to the wife's statutory separate estate.*—While rents of lands belonging to

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the wife, as her statutory separate estate, and received by the husband during coverture, are held by him in trust, and are not affected by his bankruptcy; yet, the death of the wife, intestate, terminating the trust, and creating, under the statute, a new right in the husband, rents of such lands, accruing thereafter, become the absolute property of the husband, and the right to collect them passes to his assignee in bankruptcy.

3. *Rent of lands; when a part of the freehold.*—The rule is, that, on the death of the owner of lands, rent, not then due, is not a *chose in action*, but is a part of the realty, and passes with the reversion of the freehold, as a mere incident, to those entitled.

4. *Right of bankrupt to exemption of personal property can not be asserted in State court*—A claim of exemption to personal property by a bankrupt must be asserted in the court of bankruptcy; and if not asserted and allowed by that court, it can not be afterwards asserted in a State court.

APPEAL from the City Court of Selma.

Tried before HON. JONATHAN HARALSON.

This was an action by Reese D. Gayle against Henry C. Randall on a promissory note, made by the defendant on 22d January, 1872, and payable to the plaintiff on 1st December, 1872; and was commenced on 11th June, 1879. Among other defenses the defendant pleaded, in substance, and under oath, that after the execution of the note sued on, and prior to the commencement of this suit, the plaintiff, on his petition, was adjudged a bankrupt by the decree of the District Court of the United States, for the Middle District of Alabama, and obtained his discharge as such bankrupt; and that said note thereupon became the property of the plaintiff's assignee in bankruptcy; and that the plaintiff was not the owner of said note, nor had any interest therein, at the commencement of this suit. To this plea the plaintiff replied, among other things, (1) "that although entitled to do so, he did not claim, did not have or receive, nor was he ever allowed by the assignee in bankruptcy, nor by any other person, nor otherwise, his, nor any exemptions, in such bankruptcy, to which he was entitled as such bankrupt, so in bankruptcy, under the laws of the United States, or of this State;" and (2), in substance, that the note sued on was made and delivered to the plaintiff "in the settlement of the defendant's indebtedness to the plaintiff of and for, and the consideration of said note was, the rents, income and profits" of lands which belonged to M. L. Gayle, the plaintiff's wife (who died on 11th December, 1871), as her statutory separate estate; that at the time of her death she was an inhabitant of Dallas county, in this State, "with whom the plaintiff then, and long before that time, lived as man and wife in said county, and so received and became entitled to said income, rents and profits as her husband, to maintain his said wife and their four infant

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children, under the age of fourteen years, members of their said family, therewith; and which said rents, income and profits, and the right thereto, before the accrual of the said indebtedness of defendant to the plaintiff, and thereafter continuously until and since the making of said promissory note, vested in, and belonged to him, and still do vest in, and belong to him, the plaintiff, as such the then husband of the said M. L. Gayle," under the provisions of section 2372 of the Revised Code. To this replication the defendants interposed a demurrer, which was sustained by the court. The trial resulted in a judgment for the defendant, from which the plaintiff sued out this appeal; and he here assigns as error the ruling of the City Court above noted.

REID & MAY, for appellant.

SATTERFIELD & YOUNG, *contra*.

(No briefs came to the hands of the reporter.)

SOMERVILLE, J.—The note sued on by the appellant, Gayle, was given for the rent of land belonging to his wife's statutory separate estate. It was dated January 22d, 1872, and made payable to the plaintiff on the first of December following after date. The wife, Mrs. Gayle, *had died in December, 1871*, prior to the date of the execution of the note. The plaintiff filed his petition in the United States District Court in March, 1872, and was duly adjudged a bankrupt under the provisions of the Bankrupt Law of 1867. This action was instituted in June, 1879. There is evidence of one or more payments being made on the note, so as to prevent the bar of the statute of limitations from being perfected.

The main question presented for consideration is, whether, under this state of facts, the action will properly lie in the name of the plaintiff, his bankruptcy being set up by special plea for defense.

On the adjudication of plaintiff as a bankrupt, he became *civiliter mortuus*. He no longer possessed the privilege to enter the courts as a litigant, so as to enforce his individual and personal property rights in his own name, at least so far as concerned the past. Upon the appointment of an assignee by the bankrupt court, and the execution and delivery of an assignment to him, all the property rights of the bankrupt, except such as were specially excepted from the operation of the act, vested in the assignee, with the exclusive right to sue for the same.—Bankrupt Law, 1867, U. S. Rev. St. §§ 5047, 5054;

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Bump on Bank. (8th Ed.) pp. 473, 523-9; *Robinson v. Denny*, 57 Ala. 492; *Bolling v. Munchus*, 59 Ala. 482.

The only point, then, seems to be, as to the interest which the plaintiff owned in *the rents* of his deceased wife's property, which are here sued for, and evidenced by the note in question. It is insisted that this is a trust, and does not pass to the assignee. If the wife were living, there could then be little or no doubt of the correctness of the position. The rents and profits of the wife's statutory separate estate, under our laws, only pass to the husband as her trustee, for the support of the family, and they can not be subjected to the payment of the debts of the husband.—*Lee v. Tannenbaum*, 62 Ala. 501; Code, 1876, § 2706. Such a claim would be unaffected by the bankrupt law, which provides that "no property held by the bankrupt *in trust* shall pass by the assignment."—U. S. Rev. Stat. 5053; Bump on Bank. (8th Ed.) 539.

But no trust of any kind exists here. The decease of the wife put an end to the trust, and created a new right in the husband. The Code provides, that where a married woman, having a separate estate, dies intestate, as the presumption must be here in the absence of any proof of a will, the husband, if living, becomes entitled to the "use of the realty during his life."—Code, 1876, § 2714. The plaintiff, therefore, owned a life estate in the lands in question, and the rents became absolutely his after the death of Mrs. Gayle, which occurred in December, 1871. This view is conclusive of the question against the appellant.

It is insisted that the pleadings show that the rents in question accrued prior to Mrs. Gayle's death, and that this fact is admitted by the defendants' demurrer to the second replication of the plaintiff. We do not so construe the replication, taking its averments, according to a well settled rule, most strongly against the pleader. Even if these rents were for the year 1871, there is nothing to show that they fell due before the wife's decease; and the rule is, that rent, not yet due, is not a *chose in action*, but is a part of the realty, and passes with the reversion of the freehold to those entitled, as a mere incident.

Westmoreland v. Foster, 60 Ala. 448, 455; *English v. Key*, 39 Ala. 113; Willard on Real Est. & Conv. 218; *Wright v. Williams*, 5 Cow. (N. Y.) 501; *Van Wicklen v. Paulson*, 14 Barb. 654.

The note in suit can not be claimed as property exempted for the use of the plaintiff, under the operation of the bankrupt law. The pleadings fail to show that he asserted his claim on the filing of his petition, and had the note set aside, and certified as exempt, in accordance with the general orders and provisions of the bankrupt act. This claim was within the exclu-

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sive jurisdiction of the bankrupt court, being a matter in which all the creditors were interested, and which they had a right to controvert. Hence, the State courts can not allow it to be determined, or adjudged, by invoking their jurisdiction, in any form whatever, where the matter has never been pronounced on or settled by the court of bankruptcy. Nor, when the latter court has settled the questions relating to exemption claims, will the State courts undertake to review its action directly or collaterally.—*Steele v. Moody*, 53 Ala. 418; *Lumpkin v. Eason*, 44 Ga. 339; Bump on Bank. p. 503; *Ib.* 858, Rule XIX; *Maxwell v. McCune*, 37 Tex. 515.

We find no error in the rulings of the City Court, and the judgment is affirmed.

Teague v. Germania Fire Insurance Company.

Action on Policy of Fire Insurance.

1. *Fire insurance ; measure of recovery under provisions of policy.*—A policy of fire insurance on a stock of merchandise, which was partially destroyed by removal from a building in which it was exposed to loss by fire, and on which there was additional insurance in another company, providing, (1) that “in case of any other insurance, . . . the assured shall be entitled to recover of this company no greater proportion of the loss sustained, than the sum hereby insured bears to the whole amount insured thereon;” and (2) that “when property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, the damage shall be borne by the insured and insurers, in such proportion as the whole sum insured bears to the whole value of the property insured,”—*held*, in an action on the policy, that the insurance company thereby assumed the risk, not on any defined or definable portion of the stock, but on an undivided proportion of the whole stock, the proportion which the sum of insurance bore to the value of the whole stock; and that this was the measure of the plaintiff’s recovery.

APPEAL from Butler Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This was an action by William M. Teague against the North German Fire Insurance Company, on a policy of insurance, covering a stock of merchandise. There was a judgment on verdict for the plaintiff for \$237.80, from which he appealed. The facts are sufficiently stated in the opinion.

J. C. RICHARDSON, for appellant.

CLOPTON, HERBERT & CHAMBERS, *contra*.

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STONE, J.—The single question presented in this record is as to the measure of the plaintiff's right of recovery. The right to maintain the action is not denied.

The plaintiff had a stock of goods in store, partially covered by insurance. The value of the goods at the time of the loss was something over \$9,000. They were covered by two policies of insurance—one issued by the *Ætna Insurance Company*, in the sum of \$5,000, and the other by the appellee insurance company, in the sum of \$2,000. Total of insurance \$7,000—or, about 7-9ths of the value of the goods. The fire originated in a store near by, and thus imperiled the plaintiff's goods, whose store it was approaching. The goods sustained damage to a sum exceeding \$900, partly by being burned, but chiefly in the removal. The plaintiff below—appellant here—contends that inasmuch as the loss falls below the gross amount of insurance, he should recover the full measure of his loss.

The policies issued by each of the companies in which plaintiff had obtained his insurance, contained clauses substantially as follows:

"XII. . . In case of any other insurance, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this company no greater proportion of the loss sustained, than the sum hereby insured bears to the whole amount insured thereon."

"XVI. When property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, the damage shall be borne by the insured and insurers, in such proportion as the whole sum insured bears to the whole value of the property insured."

The charge of the court was, that as to the damage done by the removal, the plaintiff could only recover in that proportion which the sum insured bore to the whole value of the stock of goods. In other words, that when partial insurance was taken, the insurance company assumed the risk, not on any defined or definable portion of the stock, but on an undivided proportion of the whole stock—the proportion which the sum of the insurance bore to the value of the whole stock. The insured took the rest of the risk; that is, he took the risk of that proportion of the undivided stock which was in excess of the insurance. He stood in the relation of insurer, or risk-taker for that excess, to the same extent, as the insurance company stood to the proportion or percentage of the goods which were covered by the insurance. Such is the plain, unmistakable language of the policy, and such, as we understand it, is the universal rule of adjusting indemnity, in cases of partial damage to merchandise, partially covered by insurance. To hold otherwise, would not only be to ignore clause

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XVI of the policy, but would lead to the following result: One partially insured, paying a smaller premium, and suffering a partial damage, just equal to the sum of his insurance, would recover the same amount of indemnity as another would, having the same amount of insurance, although the latter sustained a total loss. Thus: Two merchants, each carrying ten thousand dollars of stock, and each insured for five thousand dollars. One sustains a total loss, and the other a damage equal to fifty per cent. According to the contention, each should obtain the same amount of indemnity. This would be to hold that the goods lost or damaged were those covered by the insurance, while those saved were those on which the owner had no insurance, but was carrying the risk himself. We can not assent to this, under the language of the policy we are construing.

In *Peoria M. & F. Ins. Co. v. Wilson*, 5 Minn. 53, this precise question was considered, and was decided as we have declared above. See, also, Barber's Princ. of Ins. § 163. There is an admitted dearth of authorities on this question; possibly, because the interpretation of such policies has not often been disputed.

The judgment of the Circuit Court is affirmed.

Vann & Waugh v. Adams, Thorne & Co.

Attachment.

1. *Notaries appointed to exercise jurisdiction of justices of the peace; extent of jurisdiction.*—Whatever of jurisdiction is conferred upon justices of the peace, and whatever of power or authority they may exercise in the administration of that jurisdiction, are conferred by the constitution on notaries public appointed by the Governor to "have and exercise the same jurisdiction as justices of the peace;" but such notaries are not thereby clothed with, nor can they exercise, those special powers granted to justices of the peace, which form no part of their jurisdiction, and which are not necessary to render that jurisdiction effectual.

2. *Attachments; authority to issue must be specially conferred.*—Attachments are extraordinary process, unknown to the common law, not issuing out of a court, nor pertaining to the exercise of the ordinary powers and jurisdiction of a court; and no one has the power to issue them, unless he is thereunto specially authorized.

3. *Attachments returnable to circuit or city courts; notaries public, with jurisdiction of justices of the peace, have no power to issue.*—Notaries public appointed by the Governor to "have and exercise the same jurisdiction as justices of the peace," have no power or authority to issue original attachments, returnable to the city or circuit courts; and hence, such attachment, thus issued, is void.

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APPEAL from Marengo Circuit Court.

Tried before Hon. HARRY T. TOULMIN.

This was an attachment issued on 22d January, 1881, by J. B. Pegues, styling himself a notary public and *ex officio* justice of the peace, at the suit of Adams, Thorne & Co. against Vann & Waugh, and returnable to said Circuit Court. The defendants pleaded in abatement, *inter alia*, in substance, that the said Pegues, at the time said writ was issued, was a notary public appointed by the Governor, with the jurisdiction of a justice of the peace, in a designated precinct in said county; and that he had no authority to issue said writ. The defendants interposed a demurrer to the plea, which was sustained by the court. The plaintiffs having obtained a verdict and judgment, the defendants sued out this appeal, and here assign as error the ruling of the court above noted.

WM. E. CLARKE, and MACARTNEY & CLARKE, for appellant, cited Con. Art. I, § 9; *Ib.* Art. VI, § 26; *Webb v. Carlisle, Jones & Co.*, 65 Ala. 313; *Ex parte Gist*, 26 Ala. 156; *Sublett v. Bedwell*, 47 Miss. 266; *Carroll v. State*, 58 Ala. 401; *Ex parte Greene*, 29 Ala. 52; *Matthews, Finley & Co. v. Sands & Co.*, 29 Ala. 136; *Posey v. Pressley*, 60 Ala. 243; *Stevenson v. O'Hara*, 27 Ala. 362; *Lewis v. DuBose & Co.*, 29 Ala. 219; *Flash, Hartwell & Co. v. Paul, Cook & Co.*, 29 Ala. 141; *Ex parte Harris*, 52 Ala. 91; *Wightman v. Karsner*, 20 Ala. 446; *Woodruff v. Stewart*, 63 Ala. 211; *Ex parte Vincent*, 26 Ala. 145; *Taylor v. Woods*, 52 Ala. 477.

J. W. BUSH, E. M. VARY, and BRAGG & THORINGTON, *contra*, cited Con. 1868, Art. 6, § 13; Con. 1875, Art. 6, § 26; *Carroll v. State*, 58 Ala. 399; *Coleman v. State*, 63 Ala. 93; *Ex parte Brown*, 63 Ala. 187; *Stevenson v. O'Hara*, 27 Ala. 362; *Matthews v. Sands*, 29 Ala. 138; *Ex parte Gist*, 27 Ala. 156; *Ex parte Harris*, 52 Ala. 87; *Ex parte Thompson*, 52 Ala. 98; *Ex parte Greene*, 29 Ala. 52; Potter's Dwarrior on Stat. 675; Cooley's Con. Lim. 60-3, 195-6; *Taylor v. Woods*, 52 Ala. 477; 19 Ala. 495; Burrill's Law Dic. 2 vol. p. 113.

BRICKELL, C. J.—The constitution authorizes the Governor to “appoint one notary public for each election precinct in counties, and one for each ward in cities of over five thousand inhabitants, who, in addition to the powers of notary, shall have and exercise the same jurisdiction as justices of the peace, within the precincts and wards for which they are respectively appointed,” etc. The same section of the constitution, in a preceding sentence, declares: “Justices shall have jurisdiction in all civil cases, wherein the amount in controversy

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does not exceed one hundred dollars, except in cases of libel, slander, assault and battery, and ejection. In all cases tried before such justices, the right to appeal, without prepayment of costs, shall be secured by law." An antecedent section authorizes the General Assembly to confer on justices jurisdiction of prosecutions and proceedings for petit larceny and other misdemeanors. Legislation has put in exercise all the jurisdiction, civil and criminal, which is conferred, or which the constitution contemplates may be conferred on justices. Whatever of jurisdiction is thus conferred, a notary public appointed by the Governor may rightfully exercise, whether it is in its nature and character civil or criminal.—*Carroll v. State*, 58 Ala. 396. But it is *jurisdiction* to which the constitution refers—the power to hear and determine—and not functions and powers which may, by special legislation, have been conferred on justices of the peace. Whatever of power or of authority a justice may exercise in the administration of the jurisdiction with which he is clothed, a notary can properly exercise. The grant of jurisdiction, of itself, is an implied grant of all of the powers necessary to render the jurisdiction effectual. But, in addition to the jurisdiction conferred by the constitution and statutes on justices of the peace, and the power to render the jurisdiction effectual by the employment of particular process, there are special powers conferred on them; some of these powers being ministerial, and others in their nature judicial. These form no part of the jurisdiction of the justice—no part of his authority to judge or administer justice between parties in cases, civil and criminal. From his action in the exercise of these powers no appeal lies. It would be a very strained construction of the word *jurisdiction*, under any circumstances, to extend it to such powers. If such an extension were made in its meaning, as it is found in this particular clause of the constitution, the result would be, that it is of larger significance in this than in the preceding sentence of the same section, or in the antecedent section, defining the criminal jurisdiction with which a justice may be clothed. It is a sound and just rule of constitutional and statutory construction, that particular provisions are not to be extended beyond their general scope, unless such extension is clearly and manifestly designed. The law-maker must be considered as using expressions concerning the matter before him; and it would be an unjust interpretation to apply his words to other matters not within his consideration. It was the *jurisdiction* of a justice of the peace which was in the mind of the framers of the constitution; jurisdiction, as the term is applied to courts—the power to hear and determine causes and controversies. No rule of construction can be just or proper

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which would deflect the term from this, its direct and primary sense.

Justices of the peace, clerks of the circuit court, and judges of probate have a special statutory authority to issue writs of attachment to enforce the collection of debts, returnable to the circuit court of their respective counties.—Code 1876, § 3204. As was said in *Stevenson v. O'Hara*, 27 Ala. 362, and repeated in *Matthews v. Sands*, 29 Ala. 136, such writs were unknown to the common law, and no one has power to issue them, unless thereunto specially authorized. They are not ordinary process, do not issue out of *a court*, nor pertain to the exercise of the ordinary powers and jurisdiction of a court. In the cases to which we have just referred, after very able argument and careful deliberation, this court held, that the clerk of the City Court of Mobile, though the court was invested with the powers and jurisdiction of a circuit court, except as to actions to try titles to lands, could not exercise the power conferred on clerks of the circuit court to issue an original attachment. It was the ordinary process of circuit courts, employed in the exercise of their general jurisdiction, the clerk of the City Court could rightfully issue; and not extraordinary process which, by special statutes, clerks of the circuit court, exercising *quasi-judicial* power, could rightfully issue. The principle of statutory construction, upon which these decisions rest, is, that a general clause of reference in a statute to other statutes includes only general powers and provisions which are *in pari materia*. "The fair construction," said ASHURST, J., in *King v. Justices*, 2 Durn. & East, 504, "to put upon the clause of reference in question," (which was a general clause,) "seems to be this: That all the general powers and provisions given and made in acts *in pari materia*, shall be virtually incorporated into this, but that such provisions as are always considered as special provisions shall not."

The notary was without authority to issue the writ of attachment, and it is void. The judgment must be reversed, and a judgment will be here rendered quashing the attachment, and all proceedings had thereon. The appellees must pay the costs in the Circuit Court, and in this court.

NOTE.—The case of *Vann & Waugh v. Adams, Thorne & Co.*, *supra*, was decided at December term, 1881.—REP.

Mason v. Crabtree.*Action on Official Bond of Notary Public.*

1. *Payment by garnishee before judgment condemning debt; effect of.* Until there is a judgment rendered, condemning indebtedness of the garnishee to the payment of the demand for which it was attached, the garnishee is not authorized to pay, nor is any person, official or otherwise, authorized to demand payment by virtue of the garnishment; and a payment so made will not discharge the indebtedness of the garnishee to his creditor.

2. *Same; when justice of the peace, in receiving, acts outside of his official duty.*—A justice of the peace, or notary public having the jurisdiction of a justice of the peace, before whom is pending a garnishment in aid of the collection of a judgment rendered by him, acts outside of his official duty in collecting from the garnishee, prior to judgment against him, the amount admitted in his answer to be due the defendant; and, in the absence of statutory provisions, the collection would impose no liability on the sureties on the official bond of such justice or notary.

3. *When justice of the peace or notary public acts under color of office; liability of his sureties, and extent of recovery.*—But where the justice of the peace, or notary public having the jurisdiction of a justice, falsely represents and pretends to the garnishee that he had rendered judgment against him, and thereby pretends that he has the authority to receive the money, and, under such representation and pretense, collects the money, such justice or notary, being a bonded officer, and having authority under the statute to collect from the garnishee, on the rendition of a judgment against him, in collecting the money, commits a wrongful act under the color of his office, which renders him and his sureties liable under the statute (Code, § 179), in a suit brought against them by the defendant in the original judgment on which the garnishment is founded, for the restitution of the money; but the recovery in such case is limited to the money received, and interest thereon.

APPEAL from Mobile Circuit Court.

Tried before Hon. WM. E. CLARKE.

This was an action by N. M. Mason against L. Crabtree, and W. J. Jolly and C. Prichard, sureties on his official bond as a notary public "having the jurisdiction of justices of the peace;" and was commenced December 2d, 1881. The substantial averments of the complaint are stated in the opinion. The defendants demurred to each of the counts, assigning numerous grounds. The court sustained the demurrers to the several counts, and rendered judgment thereon for the defendants. The rulings of the court on the demurrers are here assigned as error.

LESLIE B. SHELDON, and WM. D. MCKINSTRY, for appellant, cited Code of 1876, §§ 2978, 2982, 3218, 3662, 1328, 163, 179;

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Irion v. Lewis, 56 Ala. 190; *Kelly v. Moore*, 51 Ala. 364; *Withers v. Coyles*, 36 Ala. 320; *Craig v. Burnett*, 32 Ala. 728; *Lester v. Governor*, 12 Ala. 624; *Governor v. Hancock*, 2 Ala. 728; *McElhaney v. Gilleland*, 30 Ala. 183; *Tracy v. Williams*, 4 Conn. 113.

FAITH & CLOUD, *contra*, cited *Irion v. Lewis*, 56 Ala. 190.

STONE, J.—The complaint in this cause, as originally filed, contained two counts. It was amended by adding a third. Each of the counts relies on an alleged breach of Crabtree's official bond as a notary public, "having the jurisdiction of justices of the peace." The condition of such bond is, "faithfully to discharge the duties of such office so long as [he] may continue in such office, or discharge any of the duties thereof."—Code of 1876, § 1328. Such is the averment of each of the counts in the present complaint. The suit is against Crabtree, as notary, and his sureties on his official bond. It is set forth in the first and third counts that Crabtree, as notary public and *ex officio* justice, had rendered a judgment against Mason, the plaintiff, in favor of one McDonald, and had also issued process of garnishment, making the Louisville and Nashville Railroad Company a garnishee in the cause. It is then averred that the railroad company had answered, admitting an indebtedness greater in amount than McDonald's judgment against the plaintiff, Mason. Each of these counts avers that no judgment had been rendered on the garnishee's answer, condemning said admitted indebtedness, or any part of it, to the payment of McDonald's judgment. It is then averred that Crabtree had falsely and fraudulently represented to the railroad company, garnishee, that he had condemned said admitted indebtedness of the latter to McDonald's said judgment, and that on such representation he demanded and collected said sum from the railroad company, and had failed and refused to pay the same to the plaintiff. This is the alleged breach of the bond the plaintiff relies on for a recovery.

It is very clear that until there was a judgment rendered, condemning the indebtedness in the hands of the garnishee to the payment of the demand under which it was attached, the railroad company was not authorized to pay, nor was any person, official or otherwise, authorized to demand payment, by virtue of the garnishment. A payment so made would not discharge the indebtedness of the railroad company to Mason, but would leave it as if no garnishment had been sued out or served. It is equally clear that a collection made as is alleged in this case, was not an official duty, and, in the absence of statute, would impose no liability on the notary's sureties.

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But the official bond of officers in this State is made "obligatory on the principal and sureties thereon . . . for the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office, as by his failure to perform, or the improper or neglectful performance of those duties imposed by law."—Code of 1876, § 179. In *McElhaney v. Gilleland*, 30 Ala. 183, this statute was construed. It was there said the object of the statute was "to extend the remedy beyond those cases in which a wrong is done in discharge of the legitimate duties of the office, to those in which a wrong is done under color of office." Quoting Bouvier, it was said, "Color of office is [where] a wrong is committed by an officer under the pretended authority of his office." A justice of the peace, or notary public having the jurisdiction of a justice, is a bonded officer, and, as such, has authority to collect money on claims placed in his hands for collection.—Code of 1876, §§ 756, 759, 1328; subd. 4, 1329. Under the averments of the complaint, if the notary had rendered judgment against the railroad company, condemning its indebtedness to the payment of the judgment against Mason, he would have had authority to receive the money, and to give the railroad company a lawful discharge therefrom. He pretended he had rendered such judgment, and thereby pretended he had authority to receive the money. This, if true, was a wrongful act committed under color of his office, and rendered him and his sureties liable for the restitution of the money. This is unlike the case of *McKee v. Griffin*, 66 Ala. 211. In that case there was no law authorizing the officer to receive the money in his official capacity, and official sureties are only bound for acts that are official, or done under color of office. The first and third counts are sufficient; but there can be no recovery for any thing beyond the sum of money received, and interest upon it.

Reversed and remanded.

Keiser v. Smith.

Trespass for an Assault and Battery.

1. *Trespass for assault and battery; admissibility of matters of provocation.*—In an action of trespass for an assault and battery, the defendant can not give in evidence, in mitigation of damages, matters of provocation on the part of the plaintiff, unless they happened contemporaneously with the assault and battery, or so recently prior thereto as to in-

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duce the presumption that the assault was committed under the immediate influence of the passion excited by the provocation.

2. *Same*; "cooling time" the test as to admissibility of provocation.—In such case the test is, whether the "blood had time to cool," or, in other words, whether there was reasonable cooling time between the giving of the provocation, and the commission of the assault and battery.

3. *Same*; cooling time a question for the court.—Whether there is reasonable cooling time in such case, is a question of law, to be decided by court, and not of fact, to be determined by the jury.

4. *Same*; when provocation not admissible.—*Held*, under the principles above stated, and the facts of this case, that a libel, published in plaintiff's newspaper in the morning of the day on which the plaintiff was assaulted, the assault having been committed in the afternoon, was inadmissible in mitigation of damages.

APPEAL from Lee Circuit Court.

Tried before Hon. H. D. CLAYTON.

The facts are sufficiently stated in the opinion.

J. M. CHILTON, for appellant.—(1) The court erred in admitting the newspaper articles in evidence. "The provocation, to entitle it to be given in evidence in mitigation, must be so recent and immediate as to induce the presumption, that the violence was committed under the immediate influence of the feelings and passions excited by it."—Sedg. on Dam. p. 688; *Ireland v. Elliott*, 5 Iowa, 478; *Willis v. Forrest*, 2 Duer, 310; *Collins v. Todd*, 17 Mo. 537; *Tyson v. Booth*, 100 Mass. 258; *Coxe v. Whitney*, 9 Mo. 527; *Rochester v. Anderson*, 1 Bibb, 428; *Terry v. Eastland*, 1 Stew. 156. (3) The court erred in charging the jury, in substance, that mitigating circumstances might, if they deemed them sufficient, reduce the damages to a nominal sum. There was proof of actual damages for loss of time and doctor's bill. These damages could not be reduced by proof of mitigating circumstances.—*Birchard v. Booth*, 4 Wisc. 85; Sedg. on Dam. p. 688, and note.

WM. H. BARNES, *contra*. (No brief came to the hands of the reporter.)

SOMERVILLE, J.—The action is one of trespass for an assault and battery committed on the appellant, Keiser, by the appellee. The defendant, under the plea of the general issue, offered in evidence, to mitigate damages, certain libellous articles published by the plaintiff in a newspaper called the *Ope-likia Times*, and defamatory of one D. B. Smith, a brother of the defendant. The two brothers, accompanied by one Dowdell, went to the office of the plaintiff, and, after making an ineffectual demand of retraction, severely beat the plaintiff. The court admitted the libellous articles, published in the forenoon of the same day the assault and battery was committed,

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and charged the jury, in effect, that they were a provocation which might be considered in mitigation of damages. The finding of the jury was, accordingly, for only nominal damages.

The question presented is one which has not been before decided by this court, and we fully appreciate its importance as affecting most seriously the peace and good order of society.

We are clearly of the opinion that the court erred in admitting this evidence. If the libels had been written of the defendant himself, instead of his brother, or if the brother had been sued with him in this action as a co-trespasser, they would not have been legal evidence, either as justification, or in mitigation of damages.

The rule is stated by Mr. Greenleaf as follows: "Under the general issue, the defendant, in mitigation of damages, may give in evidence a *provocation* by the plaintiff, provided it was so recent and immediate as to induce a presumption that the violence was committed under the *immediate influence of the passion* thus wrongfully excited by the plaintiff."—2 Greenl. Ev. § 93.

"No words of provocation will constitute a defense," says Mr. Field in his work on Damages, "though they may be grounds for the reduction of damages. The question on this point," he observes, "generally is, whether *the blood had time to cool*, and whether the provocation and assault formed *parts of one transaction*."—Field on Dam. p. 475, § 604.

Mr. Sedgwick says: "The defendant can not give in evidence, in mitigation of damages, the acts or declarations of the plaintiff, *at a different time*, or any antecedent facts, which are not fairly to be considered as *part of one and the same transaction*, though they may have been *ever so irritating or provoking*."—2 Sedg. Dam. (7th Ed.) 525 [547], p. 524, note. So it is said by Mr. Waterman, that such matters of provocation, in order to be admissible, must have "immediately preceded the battery, and naturally have provoked it."—1 Waterman on Trespass, § 266.

Mr. Sutherland states the principle in substance the same as the above mentioned authors, and remarks that "the law mercifully makes this concession to the weakness and infirmities of human nature, which subject it to uncontrollable influences when under great and maddening excitement, superinduced by insults and threats." "The mitigating effect of the provocation," he justly adds, "is spent when there has been *time for reflection, and for the passion excited by it to cool*."—1 Sutherland on Damages, 227-8.

These views are, in our judgment, fully sustained by the uniform current of decisions in this country for the past three-quarters of a century.

In the case of *Avery v. Ray*, 1 Mass. 11, which was decided

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in 1804, and has since become a leading case, often followed and approved, it was ruled, that the defendant could give in evidence, in mitigation of damages, immediate provocation, such as happened *at the time* of the assault, but not such as happened *previously*. It was observed, in this case, by SEDGWICK, J., that, while he favored the admission of such mitigating circumstances on a liberal scale, "to admit such evidence, where the blood had had time to cool, would be extending the rule so as to render it impossible to say where the court should stop."

The case of *Lee v. Woolsey*, 19 John. 319, was an action of assault and battery for horsewhipping the plaintiff. The defendant offered to prove, in mitigation of damages, that, on the day previous, the plaintiff had made scandalous insinuations against him, of which defendant had been informed, and *which he had stated at the time* of the assault as the *reason of the attack*. The court were unanimous in the opinion that the evidence was properly rejected. Mr. Justice SPENCER forcibly said: "It appears to me neither to comport with sound policy nor law to allow an inquiry into antecedent facts in such a case as this, unless they are fairly to be considered as part of one and the same transaction. A contrary course *would greatly encourage breaches of the peace, personal rencounters, and every species of brutal force, and would tend to uncivilize the community.*"

In *Willis v. Forrest*, 2 Duer, 310, (a case afterwards affirmed by the Court of Appeals of New York), the court excluded from evidence sundry libels published by the plaintiff of the defendant, and also testimony of a previous criminal intimacy, lasting for several years, between defendant's wife and plaintiff, basing its ruling upon the authority of *Avery v. Ray*, 1 Mass. 11, which we have above cited.

In *Ireland v. Elliott*, 5 Iowa, 478, a like ruling was made, the court observing: "If the defendant's assault was committed after time for reflection and coolness, and under circumstances leading to the presumption that it was in revenge, then he stands in the position of an original trespasser, and the words applied to him will not amount even to an extenuation."

This case was followed in *Thrall v. Knapp*, 17 Iowa, 468, where the following rule was declared by DILLON, J.: "The clear distinction is this, *contemporaneous* provocations of words or acts are admissible, but *previous* provocations are not. *And the test is, whether 'the blood had time to cool.'*" "These rules," he continued, "are founded upon a sound and enlightened public policy, which discountenances the entertaining of revengeful feelings, breaches of the public peace, and the taking by individuals of the law into their own hands, and administering

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a species of rude, dangerous and barbarous justice by force and violence."

In *Collins v. Todd*, 17 Mo. 537, very abusive language used by the plaintiff towards defendant's niece and sister-in-law, a day or two before the assault, was held inadmissible in mitigation. It was declared by the court that where there was time for deliberation, "the peace of society requires that men should suppress their passions, and neither reason nor law will suffer them to claim a diminution of their responsibility." The same court, in *Coxe v. Whitney*, 9 Mo. 527, refused to admit a libel published by the plaintiff in his newspaper, a day or two previous to the assault, reflecting in defamatory terms upon the moral character of defendant's wife.

The whole theory of the mitigation of damages in such cases was said, in a very early decision, to be based upon the respect entertained by the law to the frailty of human passions, which looks with an eye of some indulgence upon the violation of good order produced in the moment of irritation and excitement from abusive language.—*Rochester v. Anderson*, 1 Bibb (Ky.), 428. It was said by BOYLE, J., in this case, in language recognized as expressing the logic of the law: "If opprobrious words, for which the law allows an action, have been used of a man, the law furnishes a remedy, and will not permit him to redress his own wrong. If they are so frivolous as not to be deemed by the law actionable, a peaceful citizen, when he has had time for reflection, will consult the peace and good order of society, as well as his own dignity, in disregarding them."

I can find but one adjudged case contrary to these views, and that was a *nisi prius* ruling made by Lord ABINGER, in *Fraser v. Berkeley*, 7. C. & P. 621, decided in 1836. The defendant there had assaulted and beat the plaintiff, who was then the publisher of *Fraser's Magazine*, because of a libel published by the plaintiff two or three days previously, defaming the defendant and his family. This libel was admitted in mitigation of damages, in entire disregard, as we think, of sound reason and the wise policy of the law. I am aware of no case in England or America where it has been since approved.

The only proper test, at least in cases where the provocation and assault do not form parts of one continued transaction is, whether "*the blood had time to cool.*" The criterion is not alone how many days or even *hours* had elapsed since the provocation was given, although this consideration is of vast significance in ascertaining the main inquiry.—*Dolan v. Fagan*, 63 Barb. (N. Y.) 73; 1 Water. Tresp. § 268; 1 Hilliard on Torts (4th Ed.), 197, note (b).

What constitutes a sufficiency of cooling time, or of provocation, is necessarily a question of law, and not of fact, the court

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being required to decide it preliminary to the admission or exclusion of the evidence offered in mitigation, analogous to the rule governing in cases of homicide.—2 Bish. on Cr. Law, § 713; *Felix v. The State*, 18 Ala. 720.

It is manifest that no absolute rule for all possible cases can be declared. The time in which a man of ordinary prudence would cool, under a similar state of circumstances, is usually designated as a reasonable time for such purpose. The law can not preserve its own integrity, and at the same time admit the proposition, sometimes sanctioned by a sentiment originating in too tender regard for human frailty, that calm reflection on legal wrongs may justly increase one's rage in proportion to the length of time spent in their contemplation. *The recognition of such a principle would speedily undermine, and ultimately destroy that peace of society, which is absolutely essential to the very existence of good government.*

It has been said by high and ancient authority, "If two men fall out in the *morning*, and meet and fight in the *afternoon*, and one of them is slain, this is murder, for there was time to allay the heat, and their after-meeting is of malice."—*Ree v. Legg*, J. Kel. 27; 2 Bish. on Cr. Law, § 712; 1 Hawk. P. C. 190, § 22. One hour has been adjudged, in one case, to be a sufficient cooling time, and three hours in another.—2 Bish. on Cr. Law, § 712; *Johnson's case*, 30 Tex. 748. "The act must be imputable to human infirmity only, and not to deliberate judgment and malignity of heart. Any diversion of the mind to other thoughts, or to business, or any circumstances showing deliberation or reflection, as well as the mere lapse of time, repel the idea of passion."—Clark's Man. Cr. Law, p. 69, § 436, and cases cited.

There is no difficulty whatever about the application of these principles to the present case. The libellous articles appeared in the *Opelika Times*, which was issued on the morning of the day of the assault. The defendant read them in the forenoon, or about midday of the same day, and conversed with his brother, D. B. Smith, about it an hour or more prior to the difficulty, which occurred between three and four o'clock of the same afternoon. The conduct of the brother seems to have been characterized by both plan and deliberation. He read the articles several hours before the assault, after which he seems to have attended to business about his store, besides going to a bank in another part of the city. He then went home and took his dinner, came back to the store, and armed himself with a pistol and stick. He then, in company with the defendant and one Dowdell, went in search of plaintiff at his place of business, where by co-operation of the three, the plaintiff was assaulted and beat very violently. The facts evince great pre-

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meditation and design. There was ample time, in the eye of the law, for hot blood to cool. The defendant had no right, either alone or by conspiracy with others, to take the law in his own hands and avenge a publication, however scandalous, by blows, inflicted under such circumstances of deliberation.

The court erred in admitting the libels in evidence, and in many of its rulings in reference to their legal effect, and its judgment must be reversed, and the cause remanded for a new trial.

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Action against Railroad Company for Damages to Stock.

1. *Action for damages to personal property; possession sufficient title against trespasser.*—Possession of personal property, carrying with it a presumption of ownership which is not disputable by a trespasser who does not connect himself with the legal title, will support an action in tort for damages done thereto by such trespasser.

2. *Same; plaintiff's right to bring suit not affected by possession of servant.*—In such action, the plaintiff relying on possession for title, the fact that the personal property was in the custody of an overseer or servant of the plaintiff, who did not assert any interest in it, or possession of it, as distinguishable from the plaintiff's possession, does not affect the plaintiff's right to maintain the suit.

3. *Misleading charge given at request of a party, not a reversible error.* While a charge requested, which, without explanation, has a tendency to mislead the jury, by diverting them from the consideration of material evidence, may be refused by the primary court without error, the giving of such a charge is not a reversible error; but, in such case, the party complaining should ask explanatory or additional instructions, to obviate its misleading tendency.

4. *Right of owners of domestic animals to allow them to run at large; doctrine of common law in reference to, does not prevail in this State.*—The doctrine of the ancient common law, that the owner of domestic animals must keep them in his close, and can not, without becoming a trespasser, suffer them to run at large upon the unenclosed lands of others, not being suited to the actual condition of the territory of the State in its early settlement, nor adapted to the general understanding and unvarying custom and habits of the people, and being irreconcilable with the legislation in reference to estrays, and injuries to, and damages done by such animals, never prevailed in this State; and hence, an owner of such animals can not be regarded as a trespasser, or as contributing to their injury, if he suffers them to go at large, and they wander upon an unenclosed railroad, and are there injured by a passing train.

5. *Injury to stock by railroad company; ordinary and reasonable care and diligence must be exercised by company.*—A railroad company has the undoubted right to the free, unmolested and exclusive use of its road for the purposes for which it is appropriated; and, if under all the circum-

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stances, ordinary and reasonable care and diligence are exercised to avoid injury to domestic animals found upon the road, the duty to which it is subject is performed; and for injuries which are unavoidable, it can not be made liable.

6. *Reasonable care and diligence; when a question of law, and when of fact.*—Whether ordinary and reasonable care and diligence have been, in a particular case, observed, or omitted, 'is generally a mixed question of law and fact. When the facts are not disputed, and the deductions or inferences to be drawn from them are indisputable; or when the standard and measure of duty are fixed and defined by law, are the same under all circumstances, the question is for the decision of the court; but if the facts are disputed, or, if not disputed, the existence of negligence is an inference which, as mere matter of discretion and judgment, may or may not be drawn from them, the question must be submitted to the jury.

7. *Railroad corporations; failure to employ good and safe machinery, etc., evidence of negligence.*—It is the duty of railroad companies to adopt the best precautions against danger which are in use, and to procure and employ good and safe machinery and appliances, such as are most in use, and approved by the skillful and experienced in the operation of trains, and in the management of railroads; and the omission of this duty is, at least, evidence of negligence.

8. *Same; defective head-light evidence of negligence.*—Hence, in an action against a railroad company for damages, done to stock by its train, a charge, given at the plaintiff's request, instructing the jury, in substance, that if they believed from the evidence that, at the time of the accident, it was a starlight night, and the train was running at the rate of twenty-five miles per hour, and could not have been stopped by the use of all proper means, in a less space than one hundred and twenty yards, and that the head-light used on the locomotive only enabled the engineer to see the road about fifty or sixty yards ahead, and the stock so injured were on the track, and could have been seen, had the proper light been provided, and proper vigilance been exercised in time to have prevented the injury, then they would be authorized to find the defendant guilty of negligence,—is free from error.

APPEAL from Greene Circuit Court.

Tried before Hon. WM. S. MUDD.

This was an action by Winston Jones against the Alabama Great Southern Railroad Company, a corporation operating a railroad in this State, to recover damages alleged to have been done to designated stock belonging to the plaintiff by the defendant's train, "through and in consequence of the negligence and want of due care and skill of its agents and servants in operating said railroad and running its locomotive and cars over its said railroad." The defendant pleaded (1) the general issue; (2) that at the time the stock were alleged to have been injured, they were not the property of the plaintiff; (3) that at the time of the injury, the plaintiff suffered said stock to go at large in a field not enclosed by a fence, and in which the defendant had a right of way, and to go on defendant's track at a time when defendant's cars were passing over the same; and that by reason thereof, and, without negligence on defendant's part, its locomotive or cars accidentally, and in the night-time, run against or over said stock, thereby causing the injury com-

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plained of; and that, if any damage was done, it was not by or through the defendant's negligence; and (4) that at the time of the alleged injury, the defendant, a corporation existing under the laws of this State, and being in possession of the right of way over the lands on which the stock were alleged to have been injured, was running by steam power locomotives and cars over their track on this right of way, and the plaintiff suffered said stock to go at large on or near said railroad and on said right of way and track; and that by reason thereof, and a want of care on the part of the plaintiff, and without any fault on the part of the defendant, the locomotive or cars of defendant accidentally run against or over said stock, and thereby they sustained the alleged injury; and that, if any damage happened to said stock, it was caused by such accident, and not by defendant's fault. The trial was had, as appears from the judgment-entry and bill of exceptions, on issue joined on these pleas, and resulted in a verdict and judgment for the plaintiff.

On the trial the plaintiff examined as a witness one Charles Ellis, "who testified that, being employed by plaintiff, January 1st, 1879, he was the manager on the plantation, near Eutaw, known as the 'Jones place,' belonging, as witness is informed, to the estate of Joel W. Jones, deceased, in Greene county; and that he made his contract as such manager, and was put in charge of the place and stock by the said Winston Jones, except two of the mules, which he, witness, afterwards bought himself for, and under instructions from said Winston Jones, and the mare which said Winston Jones afterwards sent to witness from Mobile; and that he received all his orders from him in regard to the management of said place, but he did not know to whom the stock on said place belonged, or who was the owner thereof; that he had no dealings with any one else except plaintiff, either as to the plantation, stock thereon, or crops raised thereon; that all supplies were furnished by plaintiff, and cotton raised was shipped to him; that, to his knowledge, no one else had any title or ownership in said stock; but that the said Jones had, so far as he knew, the entire control and management of the said plantation, stock, and all the other property belonging thereto." This witness further testified that on Sunday morning, November 14th, 1879, he turned the mules and mare which were killed and injured by defendant's train, out of the lot on the "Jones place." The evidence introduced on behalf of the plaintiff further tended to show that said mules and mare were killed and injured by the passenger train of defendant on the night of November 14th, 1879, on the lands of another, about a mile and a half from the said "Jones place;" and that it was a clear starlight night, and there was no fog; that "the track of the road at and from the place

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of collision each way was through an open field, and staight for more than a mile, and that there was no obstruction on either side of the track, near enough to obstruct the view from the approaching train." The value of the stock was also shown.

The evidence introduced on behalf of the defendant tended to show, that the night of November 14th, 1879, when the stock were killed and injured, was dark, cloudy and foggy, it having rained that day; that the train was behind time on account of having a crippled engine; that, at the time the stock were run over or against, the train was on a down grade, in a low, flat place, just after crossing a trestle over a creek, and was not making over schedule time, running about twenty-five miles per hour; that the engineer could not, at that time and place, see more than sixty yards ahead of him on the track, by the head-light, and that a train running at the speed of twenty-five miles per hour could not be stopped by the appliances in use on locomotives and trains in a less space than one hundred and twenty-five yards; that immediately on crossing the trestle, the engineer first discovered the stock coming upon the railroad within thirty-five or forty yards ahead of the engine, when he immediately blew the whistle, applied the brakes (which were air-brakes), and reversed the engine, "all of which was done in an instant of time," but that the train was so near the stock, when he first discovered them, that they were run over or against before he could possibly stop the train; and that the head-light was good, and that the brakes were in good working order. The evidence for the defendant further tended to show, that on the side of the creek, where the stock seemed to have come on the railroad, from a little path, "the cottonwood trees and saplings grew very thick to within fifty feet of the track, and that an engineer on a train, coming on the down grade to that point, could not see stock or anything else on that side of the creek, until the engine had crossed the trestle, on account of the cottonwood trees, and chicken corn, which was exceedingly thick at that point," and grew up to within a few yards of the track. There was also evidence tending to show that, at the time of the accident, "the chicken corn was, to a great extent, trampled down by stock feeding thereon, and by wagons hauling out corn, a crop of which was grown on both sides of the railroad, the land being cultivated up to the railroad ditches near the track." The bill of exceptions purports to set out all the testimony, and the substance of the material portions thereof is given above.

The court charged the jury, *ex mero motu*, "that if they "should believe from the evidence, that the plaintiff had the general supervision, control and management of the plantation, stock and all the other property belonging to said plantation,

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that he employed the overseer and agent, and purchased the stock that was killed and injured, and that Ellis was his agent, employed by him, and had, at the time said stock was killed and injured, control of the said stock, as the agent of plaintiff, then the plaintiff had such an ownership in said stock, so killed and injured," as would authorize him to bring the suit, and he could recover for any injury the jury believed was done to said stock by the wrongful acts of the defendant, alleged in the complaint. The court also gave, at the written request of the plaintiff, this charge: "If the jury believe from the evidence, that, at the time of the collision, the train was running at about the rate of twenty-five miles per hour, and that the persons running the train, by using all proper means in their power, could not stop the train in a less space than one hundred and twenty yards; that it was on a starlight night, and the light provided by the defendant or its servants only enabled the engineer to see the road about fifty or sixty yards ahead of the engine; and if the jury are satisfied that the stock killed or injured, seven or more in number, were on the track, and could have been seen, had the proper light been provided, and proper vigilance exercised, in time to have prevented the collision, then the jury would be authorized to find the defendant guilty of negligence." To the giving of these charges the defendant duly excepted.

The defendant also reserved an exception to the refusal of the court to give to the jury the following charge at its written request: "If the jury believe from the evidence, that, at the time when said mare and mules were killed and injured, the plaintiff's agent turned them out, with no one to take care of, or look after them, in that portion of the country where there were no fences, and through which the railroad company had its track, on its own right of way, and over which its cars were and had been passing at various times, during the day and night; and the plaintiff's agent left said stock to wander wherever they pleased, this is a violation of the obligation which enjoins care and caution on the part of the plaintiff, and constitutes such negligence on the part of the plaintiff as contributed to the result complained of; and they would be authorized in finding a verdict for the defendant, unless the evidence satisfied them that the servants or employees of the railroad did not use diligence of foresight, due precaution, proper care and diligence to stop said train, so soon as they discovered the stock on or near the track, so as to avoid, if possible, any injury to the same."

The charges given and the charge refused are here assigned as error.

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CLARK & McQUEEN, for appellant.—(1) It is admitted that, although the complaint avers that the injury complained of was done through the negligence, want of care and skill of defendant's agents and servants, the burden of proof is on the defendant to show that the requirements of section 1699 of the Code were complied with by the engineer. As to these requirements, see *Mobile & Ohio R. R. Co. v. Williams*, 53 Ala. 595; *S. & N. R. R. Co. v. Thompson*, 62 Ala. 494; *S. & N. R. R. Co. v. Williams*, 65 Ala. 74. The proof shows that these requirements were complied with, and the defendant was guilty of no negligence, want of care or skill. (2) The complaint avers that the stock injured and killed *belonged to the plaintiff*, and the burden of proof is on him to show this fact. The evidence fails to show that the plaintiff owned the stock, or that he ever had possession thereof, or the right of possession. Ellis was in possession, managing, etc., and stood in a better attitude for a plaintiff than Jones. The evidence on this point is discussed at length. To maintain this action "the plaintiff must show that, at the time when the injury was done, he had either the *actual* possession, or else he had a *constructive* possession in the thing injured, *and that he had a general or qualified* property therein."—1 Wait's Law & Prac. pp. 805-6; *Thompson v. Spinks*, 12 Ala. 155; *Stodder v. Grant*, 28 Ala. 416; *McNutt v. King*, 59 Ala. 597; *Yerby v. Sexton*, 48 Ala. 311. (3) Under the evidence the charge given at plaintiff's request was erroneous. Evidence discussed on this point, and the cases of *Memphis & Charleston R. R. Co. v. Lyon*, 62 Ala. 71, and *Jones v. Ala. Great So. R. R. Co.*, not reported, cited. (4) The plaintiff was guilty of contributory negligence in turning his stock out, and allowing them to go at large off the place. The act of the legislature, known as the stock law, was the law of the land, and made it the duty of every citizen to keep up his stock, at least at night. (5) The charge requested by the defendant, though drawn up hurriedly, was a proper charge under the evidence, and should have been given.

SNEDECOR & HEAD, *contra*.—(1) The charge given by the court, *ex mero motu*, asserts a correct legal proposition. A defendant, when sued for an injury to property in possession of the plaintiff, can not set up a paramount outstanding title in a third person. If there was evidence that Jones was in possession as agent or bailee merely, and not as owner, he could recover in this action.—*Hare v. Fuller*, 7 Ala. 717; 2 Add. on Torts, p. 531, § 1292. But the undisputed evidence is, that Jones, by his agent, Ellis, had entire possession, management and control of the property; and there is no evidence that any one

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else had any right, title or interest whatever therein. (2) The charge given at plaintiff's request is the same, and is based on the same evidence that was passed on by this court on former appeal; and it was there held a proper charge.—*Jones v. A. G. S. R. R. Co.*, not reported. See also *M. & C. R. R. Co. v. Lyon*, 62 Ala. 71. (3) The charge requested by the defendant was properly refused. It has been frequently decided by this court, that permitting stock to run at large does not constitute contributory negligence.—*Jones v. A. G. S. R. R. Co.*, *supra*; *M. & O. R. R. Co. v. Williams*, 53 Ala. 595; *S. & N. R. R. Co. v. Williams*, 65 Ala. 74; *Foster v. Holly*, 38 Ala. 76.

BRICKELL, C. J.—The general rule is, as is insisted by counsel for the appellant, that an action for a tort must be prosecuted in the name of the party having the legal interest; and, if it be an injury to property, in the name of the party having the legal title to the property at the time of the injury.—1 Chit. on Pl. 69; *Roberts v. Connelly*, 14 Ala. 235. We pass over the fact, that of a part of the stock injured the plaintiff had not only possession, but the general, absolute property. Of the others, and of the plantation to which they were attached he had the open, unmolested possession, exercising the dominion of ownership. The bare possession of personal property constitutes a sufficient title to enable the party enjoying it to pursue legal remedies against a mere wrongdoer. In legal contemplation "possession, indeed, may be considered as the primitive proof of title, and the natural foundation of right."—*Linscott v. Trask*, 35 Me. 150. The possessor of personal property is *prima facie* the owner; and the presumption of ownership arising from it is not disputable by a trespasser, who does not connect himself with the true title.—*Cook v. Patterson*, 35 Ala. 102; *Hare v. Fuller*, 7 Ala. 717; *Cox v. Easley*, 11 Ala. 362. There is no force in the suggestion that Ellis, not the plaintiff, had the possession of the stock. He was the mere overseer or servant of the plaintiff, supervising and managing the plantation under his instructions, not asserting any interest in the property, or possession of it, as distinguishable from the possession of the plaintiff, and incapable of maintaining in his own name any action for an injury to it.—*Heygood v. State*, 59 Ala. 49. We think it indisputable that the plaintiff was entitled to maintain the action.

The instruction given on request of the plaintiff is not drawn very carefully, and, it may be, without explanation, had a tendency to divert the consideration of the jury from material evidence, and to mislead them. If this be true, the Circuit Court could, without error, have refused to have given it; but, having given it, the defendant, to obviate its misleading ten-

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dency, should have requested explanatory or additional instructions. And such instructions not having been requested, a reversal of the judgment, because of the tendency of the instruction to mislead, can not be allowed. As we construe the instruction, it affirms that the jury were authorized, not bound or compelled, to impute negligence to the defendant, if they found from the evidence, that the injury occurred on a clear, star-light night, when the train was running at such a rate of speed, that those having charge of it, by the employment of all the means in their power, could not stop it within the distance that, by the aid of the head-light provided, they could see obstructions on the track, and the injury would have been avoided if a suitable head-light had been provided, and proper diligence exercised. The charge requested by the defendant affirms, that the plaintiff was guilty of contributory negligence in suffering the stock to run at large near an unenclosed railroad, upon which trains were passing day and night.

The relation, the respective right, duty and liability of the owners of domestic animals, such as horses, mules, cattle, sheep, swine, etc., stock as they are usually termed, suffered to run at large, and a railroad company operating trains upon an unenclosed road, the statutes define and regulate, and have been the subject of numerous judicial decisions.—Code of 1876, §§ 1699–1704; *N. & C. R. R. Co. v. Peacock*, 25 Ala. 229; *M. & C. R. R. Co. v. Bibb*, 37 Ala. 699; *N. & C. R. R. Co. v. Williams*, 65 Ala. 74; *Jones v. Ala. Gt. Sou. R. R. Co.* [Not reported.] The doctrine of the ancient common law, that the owner of domestic animals must keep them in his own close, and can not, without becoming a trespasser, suffer them to run at large upon the unenclosed lands of others, never prevailed in this State. There was not probably a principle of the common law so little suited to the actual condition of the territory of the State in its early settlement, and more illy adapted to the general understanding and unvarying habit and custom of the people; and it is not reconcilable with the legislation in reference to estrays, and injuries to, and damages done by wandering domestic animals. This legislation is founded upon the theory of the right of the owner to suffer them to run at large, protection to him in the exercise of the right, and subjection of him to liability for damage done by them only when they break a lawful enclosure.—Code of 1876, §§ 1552–97. The owner can not be regarded as a trespasser, or as contributing to their injury, if he suffers them to go at large, and they wander upon an unenclosed railroad. In turning them upon, or suffering them to go upon lands not enclosed, he is in the exercise of a lawful right; and to demand of the company operating trains upon a track not enclosed to prevent them from wandering up-

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on it, ordinary care and diligence to avoid injuries to them, is also his lawful right. The right is the same in character and degree, as his right to exact from any other landed proprietor, whose premises are not enclosed, the same duty, if the animals are found upon such premises. The company has the undoubted right to the free, unmolested, exclusive use of the road, for the purposes to which it is appropriated, and, if under all the circumstances, ordinary and reasonable care and diligence are exercised to avoid injury to animals found upon the road, the duty to which it is subject is performed, and for injuries unavoidable it can not be made liable.—*Zeigler v. S. & N. R. R. Co.* 58 Ala. 594.

Whether ordinary and reasonable care and diligence have been in a particular case observed, or whether they have been omitted, is generally a mixed question of law and of fact. When the facts are not disputed, and the deductions or inferences to be drawn from them are indisputable; or, if the standard and measure of duty are fixed and defined by law, and are the same under all circumstances, the question is for the decision of the court, and not for the verdict of the jury. But if the facts are disputed, or, if not disputed, the existence of negligence is an inference, which, as mere matter of discretion and judgment, may or may not be drawn from them, the question must be submitted to the jury.—2 Thomp. on Negl. 1236-40. In *M. & C. R. R. Co. v. Lyon*, 62 Ala. 71, we held that it is negligence *per se*, negligence as matter of law, for a railroad company to run its train in the night-time, with a head-light not having sufficient capacity to cast light upon the track so that the engineer could perceive obstructions for the distance within which the train could be stopped. It was not intended to assert more than that it is the duty of railroad companies to employ the best machinery and appliances which are in use, and the failure to employ them, in view of the hazardous agencies they control, the dangers necessarily incidental, is a want of the care and diligence a man of ordinary prudence would observe. The omission to provide them is a violation of the duty enjoined by law, and if there be no more in the particular case than the omission and consequent injury, the court may, as matter of law, declare there is actionable negligence. The proposition must, however, be accepted with limitations and qualifications; from unknown causes, the machinery and appliances may, in the course of travel, become defective, or natural causes may intervene which render it inefficient; the train can not be expected to stop on the track. The stoppage may involve more of peril than its continued running as the machinery will permit; and, if under such circumstances, reasonable care and diligence are observed, negligence could not be imputed. If it were true, that from

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fog, or from driving rains or snow, the light cast from a proper head-light was obscured, the running of the train with reasonable care in view of that circumstance could not be deemed negligent. This, however, is an inquiry the instruction does not involve. The dark, cloudy night, and the dense fog were, as the evidence of the defendant tended to show, the causes obscuring the light, and not any defect in, or insufficiency of the head-light. The instruction proceeds upon the hypothesis that these causes did not exist, that it was a clear, starlight night, a phase of the case shown by the evidence of the plaintiff, and that the head-light was insufficient, and not such a light as the defendant was bound to provide, and the failure to provide a proper light was, under the circumstances, evidence of negligence for the consideration of the jury. The proposition that it is the duty of railroad companies to adopt the best precautions against dangers which are in use, to procure and employ good and safe machinery and appliances, such as are most in use, and approved by the skillful and experienced in the operation of trains and the management of railroads, and the omission of the duty, to say the least of it, is evidence of negligence, can not be seriously controverted.—1 Thomp. on Negl. 495; *F. & B. Turnpike Co. v. P. & T. R. R. Co.* 54 Penn. St. 345. This is all the instruction, properly construed, can be regarded as asserting.

We find no error in the record prejudicial to the appellant, and the judgment must be affirmed.

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Summary Proceedings against County Treasurer for Failure to pay Claim against the County.

1. *Summary judgment against county treasurer for failing to pay allowed claim; when motion insufficient.*—The summary remedy against a county treasurer for failing to pay a claim against the county under the provisions of section 3395 of the Code, can only be maintained when the demand sued for is an “allowed claim” against the county; and hence, a motion which fails to aver that such claim had been allowed, is insufficient on demurrer.

2. *Sheriff’s fees for summoning witnesses for defendants in State cases; not a claim against the county.*—A sheriff’s fees for summoning witnesses for insolvent defendants in criminal cases, being for services rendered for the defendants, are not a charge against the fine and forfeiture fund of the county.

APPEAL from Greene Circuit Court.

Tried before HON. SAMUEL H. SPROTT.

[Boothe v. King.]

This was a motion for a summary judgment, under the statute, by Benjamin Cohen against Charles Coleman, as treasurer of Greene county, the grounds of which are sufficiently stated in the opinion. The defendant interposed a demurrer to the motion, which was sustained by the court; and the plaintiff declining to plead further, a judgment was rendered for the defendant. That judgment is here assigned as error.

HEAD & BUTLER, for appellant.

T. W. COLEMAN, and H. C. TOMPKINS, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—The summary remedy invoked in this case against the county treasurer can only be maintained when the demand sued for is an “allowed claim” against the county. Code of 1876, § 3395. The motion, taking the place of a complaint, failed to aver the claim sued on had been allowed, and therefore failed to aver any statutory ground of recovery. The demurrer was rightly sustained.—2 Brick. Dig. 464, § 6.

In the first paragraph, or ground of the motion, the claim asserted consists of fees alleged to be due the sheriff for summoning witnesses for defendants in State cases—the defendants being insolvent. Such services are rendered for the defendants, and must be paid for by them. They are not a charge against the fine and forfeiture fund.

Affirmed.

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Summary Proceeding against County Treasurer for Failure to pay Claim against County.

1. *Claim against county; when must be audited.*—An order of the court of county commissioners, declaring a named person a pauper, and allowing for her support a designated sum per month, “payable monthly out of any money in the treasury not otherwise appropriated,” but not designating, or contracting with any particular person therefor, does not authorize the judge of probate to draw his warrant on the county treasurer in payment of a claim for the support of such pauper, at the rate specified in the order, in favor of the party rendering the service; but before such order can legally be drawn, the claim must be audited and allowed by the court of county commissioners.

2. *Warrant of judge of probate; when not an audited and allowed claim*

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against the county.—Hence, a warrant drawn by the judge of probate, under such order, for the support of the pauper, before the claim therefor has been audited and allowed by the court of county commissioners, will not support a summary proceeding under the statute (Code, § 3395) against the county treasurer for failing to pay it as an allowed claim against the county.

APPEAL from Coffee Circuit Court.

Tried before Hon. H. D. CLAYTON.

The nature of this proceeding and the evidence introduced on the trial are sufficiently stated in the opinion. The court refused plaintiff's motion on the evidence, and he excepted. This ruling is here assigned as error.

W. D. ROBERTS, for appellant. (No brief came to the hands of the reporter.)

GARDNER & WILEY, *contra*, cited *Speed v. Cocke*, 57 Ala. 209.

STONE, J.—The present suit was instituted by motion against the county treasurer and his sureties, under § 3395 of the Code of 1876. The foundation of the suit was an order on the minutes of the court of county commissioners, in the following form:

“Commissioners Court, Regular Term, February 18th, 1867. It is ordered by the court that Mrs. Jane Boothe's granddaughter, Dink Ruggs, be declared a pauper, and allowed eight dollars per month, payable monthly, out of any moneys in the treasury not otherwise appropriated.”

The moveant then read in evidence a paper in the following form:

“Commissioners Court, Regular Term, February 18th, 1867. It is ordered by the court that the county treasurer pay Mrs. Jane Boothe sixty-four dollars for support of her granddaughter, Dink Ruggs, from June 15th, 1870, to February 15th, 1871, out of any money in the treasury not otherwise appropriated. Issued from standing order. Issued February 20th, 1871.

[Signed]

B. M. WEEKS,
Judge of Probate.”

Indorsed:

“Registered in book No. 2, page 60, No. 2291—amount \$64. February 20th, 1871.

[Signed]

J. J. WARREN,
County Treasurer.”

The paper last above copied, we suppose, was relied on to prove the claim had been audited and allowed. It will be observed it has two dates. The one at the head, February 18th, 1867, is the same as that of the original order of the court of county

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commissioners, which declared Dink Ruggs a pauper, entitled to support at the rate of eight dollars per month, at the expense of the county. The last date, at the foot of the instrument, is February 20th, 1871. This purports to be the date on which the so-called warrant was issued, and we are satisfied that is its true date. Does it, then, purport to be a claim, audited and allowed by the court of county commissioners? We feel compelled to hold it does not. A claim to go before that court for audit, must be an existing claim—one for services, or other consideration previously rendered. For some purposes that court can, no doubt, contract prospectively; but even then, the claim should generally be audited and allowed before it is paid. See *Speed v. Cocke*, 57 Ala. 209; *Parker v. Hubbard*, 64 Ala. 203. The order of February 18th, 1867, was not a contract. It did not bind the county to pay any particular person for supporting the pauper, Dink Ruggs. It simply declared her a county pauper, and determined the rate to be paid for her support. It did not designate by whom she should be supported. It could not then determine by whom she would be supported, for, it would seem, she was then, for the first time, declared a pauper. Before the court of county commissioners could properly allow a claim for her support, it should have been shown she had been supported, by whom supported, and for what length of time. This is what is meant by auditing the claim, and this could not take place until after the services were rendered. As we understand the paper, claimed to be a warrant, it was and is nothing but the act of the judge of probate, based alone on the order the court made, February 18th, 1867. This, styled by the judge a "standing order," was erroneously interpreted by him as giving him authority to issue the warrant. To authorize that, Mrs. Boothe's claim should have been first audited and allowed by the court of county commissioners, which alone had authority in the premises.—Code of 1876, § 826; *Palmer v. Fitts*, 51 Ala. 489.

There is no error in the record, and the judgment of the Circuit Court is affirmed.

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Action for Money had and received for Plaintiff's Use.

1. *Right of transit through the State guaranteed to citizens by constitution.*—Under constitutional provisions, both State and Federal, every

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citizen of the United States and of the several States of the Union has, as an attribute of personal liberty, the right of free egress from, and transit through the State, unless restrained by due course of law; and this right is subject only to such legislative regulations as may be imposed by the exercise of the police power of the State, or as may remotely affect it in the legitimate exercise of the power of State taxation.

2. *Constitutionality of statutes; how determined.*—A statute is to be interpreted according to the intention of the legislature, apparent on its face, and its constitutionality must be determined by its natural and reasonable effect.

3. *Same; power of legislature to regulate constitutional right.*—No principle of construction is sounder than the common-sense and cardinal rule, that “what can not be done directly can not be done indirectly;” and hence, a constitutional right, though subject to regulation, can not be destroyed, or impaired under the device or guise of being regulated.

4. *Act of January 22, 1879 (Pamph. Acts, 1879-80, p. 205), as amended by act of December 8th, 1880 (Pamph. Acts, 1880-1, p. 162), unconstitutional.*—The act of January 22, 1879 (Pamph. Acts 1879-80, p. 205), as amended by act of December 8th, 1880 (Pamph. Acts, 1880-1, p. 162), providing that “no person, whether for himself or for other persons, shall be permitted to employ, engage, contract, or in any other way induce laborers to leave” the counties designated in the act, “for the purpose of removing said laborers from this State, without first paying to each of said counties in which such person shall operate a license tax of two hundred and fifty dollars, such license tax to be collected as other license taxes,” etc., and declaring a violation of its provisions a misdemeanor, being an indirect tax upon the citizen’s right of free egress from the State, and operating to hinder the exercise of his personal liberty, and to seriously impair his right to emigrate, is violative of both the State and Federal constitutions, and is void.

5. *Same; can not be sustained as a legitimate exercise of the police power of the State.*—Said act has none of the characteristics of a law designed to provide regulations promotive of domestic order, morals, health, or safety, or kindred subjects, properly falling within the purview of domestic police; and hence, it can not be sustained as a legitimate exercise of the police power of the State.

6. *Same; can not be sustained as a license tax.*—Nor can the act be sustained as a statute designed to impose a mere occupation or business tax; because, on its face, and by its terms, a license is required for the doing of a single act, and not for carrying on a business or occupation.

APPEAL from the City Court of Montgomery.

Tried before Hon. THOMAS M. ARRINGTON.

This was an action by Thomas Joseph, jr., against Francis C. Randolph, to recover \$250, which the plaintiff paid to the defendant, as judge of probate of Montgomery county, for a license under the provisions of an act, entitled “An act to amend an act to require a person who employs, or in any way engages laborers in the counties of Dallas, Perry and other counties therein named, for the purpose of removing said laborers from the State, to pay a license tax, approved January 22, 1879.” This amendatory act was approved December 8th, 1880.—Pamph. Acts, 1880-1, p. 162. The complaint sets out at length the facts on which the recovery is claimed, showing a payment under protest, and after the defendant’s arrest for a

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violation of the provisions of the act; but, in as much as the only question discussed by counsel, or considered by the court, is the constitutionality of the act under which the payment was made, it is unnecessary to state more fully the averments of the complaint. The defendant interposed a demurrer to the complaint, which was sustained by the City Court; and the plaintiff declining to amend, judgment final on the demurrer was rendered for the defendant.

The ruling of the court on the demurrer is here assigned as error.

THOS. G. JONES, and J. M. FALKNER, for appellant.—(1) The tax, which is called a license, is not a tax or license on the *occupation* or *business*. An act (p. 255, Acts 1876-7) approved January 30th, 1876, had already imposed such tax. The later act is aimed at the *act of hiring*, with a view to removal abroad. There is no doubt of this when the two acts are taken together. The test is the ordinary and practical *result of the statute*.—*Henderson v. Mayor*, 92 U. S. 268. (2) This is a vicious species of class legislation. A man's right to labor for subsistence is a natural right, and amply protected by the Declaration of Rights. The right to make a contract to labor, is essential to the right to labor; and the constitution expressly recognizes the right to labor where one pleases, in giving the right to go where one pleases.—Declaration of Rights, § 37. It takes *two* to make a contract. The burden of \$250 on one party's right to contract, necessarily operates on the contract itself. The State in this case charges as much for the right to make the contract as any unskilled laborer can earn in a year. Its inevitable effect is to tax the right to contract out of existence. The legislature can only regulate, it can not *destroy* a right given by the constitution or protected by it, and can not accomplish by indirection what it can not do directly.—*Railroad Co. v. Morris*, 65 Ala. 200. A license for sale of goods, is in effect a tax on the goods themselves.—*Welton v. Missouri*, 91 U. S. 275. So a license on the sale of *labor*, is a tax on the laborer himself.—*Almy v. California*, 24 Howard, 173; 12 Ala. 178; 92 U. S. 270. This act singles out laborers alone, of all other persons in the State, who contract to render services, and puts an iniquitous burden on them, when the rest of the people of the State, similarly situated, are left entirely free. There is neither necessity, reason nor justice in the imposition. It can not be justified as the exercise of *police* power, since the act does not contain a single regulation looking to the peace, morals, welfare or safety of either the community or of the emigrants. It is a naked attempt to tax a constitutional right out of existence.—*Ling Sing v. Wash-*

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burn, 20 California, 579. If the legislature may put this burden on the laborer for the mere making of a contract for his labor, it may do it as to all who furnish him food, raiment or shelter, and in the end degrade and outlaw him. Under the constitution, and the framework of our government, all must be equal in the exercise of *fundamental* constitutional rights. If a class can be regulated differently from the rest of the community, there must be a *necessity*, a *reason*, to justify it. Cooley Con. Lim. § 393; *Ex Parte Dorsey*, 7 Porter, 361. The only test for determining who constitute *the class* upon all of whom this special law must operate to be constitutional, is whether the individual rights and duties, in connection with the subject-matter, regardless of the name or classification given, fairly bring them within the reasons which justify the passage of the law. If it were otherwise, there would be no limit to the power to oppress by class legislation; and there might be as many classes and, consequent class distinctions, as the legislative vocabulary could find terms in which to name them. Rights and privileges can not be allowed certain individuals, and denied to others similarly situated, merely because the legislature chooses to classify them by different names. The nature of the act forbidden or permitted; its subject-matter; its legal quality; the consequences and persons' connection therewith, must fix and determine the *class* which may be governed by special law, different from that applicable to the community at large. The legislature can not discriminate between persons, simply by calling them by different names. *Railroad Co. v. Morris*, 65 Ala. 200; *Wally v. Kennedy*, 2 Yerger, 554; *Holden v. James*, 11 Mass. 396; 12 Bush. (Ky.) 110; 1 Curtis, 327. The fundamental rights of an Alabamian, no valid *police* regulation being attempted, must be the same in every county; otherwise rights and privileges of citizenship would be determined by counties. The legislature might as well attempt to declare that any person who contracted with a *laborer* to educate his child in *Montgomery county*, should be taxed fifty dollars, and no tax should be required for contracting to do the same service for him in *Madison county*, as to uphold this act. (3) This act impairs the right of the citizen to *emigrate*. Contracts to labor in another State are the ordinary and usual modes for a laborer's obtaining means to move.—Code, §§ 1750-1755. The tax is a prohibition. It prevents advances to enable him to leave, on the faith of his promise to labor in his new home. Its purpose is to make the laborer a mere thing—a fixture to the soil. It is in the very teeth of the Declaration of Rights, § 31. An Alabamian is thereby a citizen of the United States, and, as such citizen, can not be taxed for moving from one State into another.—16 Wal-

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lace, 80; *Crandall v. Nevada*, 6 Wallace, 36; *Ward v. Maryland*, 12 Wallace, 430. It is established that no State can put a tax upon a carrier, because he transports freight from one State into another.—15 Wallace, 279. Hence, it can not tax the transporter for making such a contract, and a contract to emigrate is as fully protected as a contract to transport. The State can not interfere with it in this way.—*Brown v. Maryland*, 4 Wheaton, 419; *Crandall v. Nevada*, 6 Wallace, 36; 91 U. S. 275. (4) The statute is also a violation of the XIV Amendment of the Constitution of the United States. This point elaborately discussed, and the following cases cited in support thereof: *Baker v. Portland*, 5 Saw. 566; *State v. Claiborne*, 1 Meigs (Tenn.) 337; *Ah Kow, v. Nunan*, 5 Saw. 562; *Re Ah Fong*, 3 Saw. 156; *Welton v. Missouri*, 91 U. S. 275.

SHAVER & HUTCHESON, *contra*.—(1) “The burden of proof is on him who asserts the unconstitutionality of a statute; and, unless it is clear that the legislature has transcended its authority, the courts will not interfere.”—*Sadler v. Langham*, 34 Ala. 311. (2) It is settled in this State that there are no limits to the legislative power of the General Assembly, save such as are imposed by the State or Federal constitutions. *Dorman v. The State*, 34 Ala. 216. (3) It is claimed that the act under consideration “*impairs* the right of the citizen to emigrate.” If this be true, then every regulation of a constitutional right is an impairment of it. The inhibition is against a *prohibition* of the right, and not against a *regulation* thereof. To *regulate* is not to *prohibit*; and the right to regulate the exercise of a right is universally conceded. (4) The act is not class legislation. It does not *directly* affect the laborer; and its operation upon the right of the laborer to hire or make contracts is merely *remote* and *indirect*.—See *City of New York v. Miln*, 11 Peters, 102; *Slaughter House Cases*, 16 Wall. p. 63. And the act is public in its object. Such laws may, unless express constitutional provision forbids, be either general or local in their application, and may embrace one or many subjects, and may extend to all citizens, or be confined to particular classes.—Cooley’s Cons. Lim. (4th Ed.) pp. 488-9. (5) The counties embraced in the act are dependent for the most part on agriculture. About the time the act in question was passed, as this court will judicially know, what was known as the “Kansas Exodus” movement was going on among the agricultural laborers of this section; and, in addition to this, then and ever since, contractors on numerous railroads, in process of construction out of the State, were and have been engaged in hiring such laborers in those counties mentioned in the act, and taking them off plantations and from other indus-

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tries, and carrying them out of the State, thus endangering the farming interests. This is the *reason* of, and hence arose the *necessity* for the statute. As to whether there exists a reason or public necessity for a law, the legislature is the sole and exclusive judge.—*Dorman v. State*, 34 Ala. 235; *Mayor v. Yville*, 3 Ala. 143; Cooley on Cons. Lim., p. 129. (6) The act is a legitimate exercise of the police power of the State. Following authorities cited and discussed on this point: *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 149; 2 Kent's Com. 340; *Passenger Cases*, 7 How. 283; *Re Ah Fong*, 3 Saw. 154; Code of 1876, § 4325. (7) The act is not violative of the XIV Amendment or any other provisions of the constitution of the United States. Following cases cited and discussed *in arguendo*: Cooley's Con. Lim. p. 715; *License Cases*, 5 How. 504; *Passenger Cases*, 7 How. 283; *Slaughter House Cases*, 16 Wall. 36; *License Tax Cases*, 5 Wall. 471; *Orandall v. Nevada*, 6 Wall. 35. (8) The power of the State to tax, control, or regulate any business carried on within its boundaries, is recognized by the acts of Congress, and sustained by all the authorities.—*License Tax Cases*, 5 Wall. 462.

SOMERVILLE, J.—The question presented for decision is a constitutional one, involving the validity of an act of the General Assembly of this State, entitled "An Act to require a person who employs, or in any way engages laborers in the counties of Dallas, Perry," and other counties therein named, "*for the purpose of removing said laborers from the State, to pay a license tax;*" which act, as originally approved on January 22, 1879, designated the amount of such license at one hundred dollars.—Acts 1873-9, p. 205. It was amended December 8, 1880, so as to increase this license to *two hundred and fifty dollars*.—Acts 1880-81, p. 162.

It provides that "no person, whether *for himself or for other persons*, shall be *permitted to employ, engage, contract, or in any other way induce laborers to leave the counties of Dallas, Perry, . . . Montgomery . . . for the purpose of removing said laborers from this State*, without first paying to each of said counties in which such person shall so operate a license tax of two hundred and fifty dollars, such license tax to be collected as other license taxes," etc.

It is insisted, among other things, that the plain intent and natural effect of this statute is to tax, by indirection, the constitutional right of the citizen to have free egress, at all seasonable times, by emigration from the State. If this view be correct, it is clear that the validity of the act can not be sustained.

There can be no denial of the general proposition that every
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citizen of the United States, and every citizen of each State of the Union, as an attribute of personal liberty, has the right, ordinarily, of free transit from, or through the territory of any State. This freedom of egress or ingress is guaranteed to all by the clearest implications of the Federal, as well as of the State constitution. It has been said that even in England, whence our system of jurisprudence was derived, the right to personal liberty did not depend on any express statute, but "it was the birthright of every freeman."—Cooley's Const. Lim. 342. This right was said by Sir William Blackstone to consist in "the power of locomotion, of changing situation, or of moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due process of law."—1 Bl. Com. 134. For its summary vindication, when illegally molested, the writ of *habeas corpus* had its origin, and was established with *magna charta*.—Hurd on Habeas Corpus, 143.

This liberty of inter-state transit, thus based on the assertion of personal liberty, is referable to many clauses of the Federal constitution. In *Ward v. Maryland*, 12 Wall. 418, 430, it was classed by Mr. Justice CLIFFORD as one of "the *privileges* and *immunities* of the citizens of the several States," guaranteed to the citizens of each State by Art. IV., Sec. 2 of the constitution of the United States. In the *Passenger Cases*, 7 How. (U. S.) 283, it was recognized by a majority of the Supreme Court of the United States as a right protected by the commercial clause of the Federal constitution from hostile State legislation, and its existence was admitted by all, and denied by none. Mr. Justice WAYNE said that no State had the right "to tax a foreigner or person for coming into one of the United States." "That," he continued, "would be a tax or revenue act, in the nature of a regulation of commerce acting upon navigation," and as such he thought it violative of the Federal constitution.—*Passenger Cases, supra*, 420. In *Crandall v. State of Nevada*, 6 Wall. 35, the entire court concurred in the view, that a capitation tax of one dollar, imposed by the legislature of Nevada upon every person leaving the State, as a passenger by railroad, stage-coach or other mode of conveyance, was unconstitutional and void. The reason was, that it infringed the unquestionable right of every citizen to have free ingress and egress, *to* and *from* and *through* the States and Territories composing a common general government—a right fully recognized by all the judges as having an undoubted existence, although they differed as to the particular ground upon which it could be rested.—Rorer on Inter-State Law, 315.

Our present State constitution contains an obvious recognition of the right under discussion in the declaration, that "*emi-*

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gration shall not be prohibited," and in the fundamental maxim that "all men are endowed by their Creator with certain inalienable rights, among which are *"life, liberty and the pursuit of happiness."*—Const. 1875, Decl. Rights, §§ 1, 31.

The right of every citizen, or person to enjoy free egress from, or transit through the State, is, in our opinion, an undoubted constitutional right. The framers of the Federal constitution clearly intended that personal intercourse between the States should be, so far as practicable, as free as the transit of the ocean, and as unembarrassed as the commerce of the public seas. It must, therefore, remain unfettered and free, subject only to such legislative regulation as may be imposed by the exercise of the *police power* of the States, or as it may be remotely affected by the legitimate exercise of the power of *State taxation*. Let us examine this act, so as to test it in the light of these two considerations.

A legislative act is to be interpreted according to the intention of the legislature apparent on its face. So the purpose and constitutionality of a statute, in whatever language it may be framed, "must be determined by *its natural and reasonable effect*."—*Henderson v. Mayor, &c., New York*, 92 U. S. 259; *Chy Lung v. Freeman, Ib.* 275.

Construing the statute now under consideration according to this rule, it can scarcely be sustained as an exercise of the police power of the State. This power is generally said to extend to making regulations promotive of domestic order, morals, health and safety, having its just foundation in the public right of self-defense, and its origin in the maxim, *Sic utere tuo ut alienum non lædas*.—*Thorpe v. The Rutland, &c., R. R. Co.*, 27 Vt. 149; *The Amer. Union Tel. Co. v. The Western Union Tel. Co.*, 67 Ala. 26. This act has none of the characteristics of a law designed to regulate these or kindred subjects, which properly fall within the purview of domestic police. *There can be nothing so injurious or offensive in the act of hiring a single unemployed laborer, for one's service, as to require police regulation by the State.*

Nor, very manifestly, is this statute designed to impose a mere *occupation or business tax*, which is always done either for purposes of revenue, or of police regulation.—Coooley's Const. Lim. 596, (5th Ed.) p. 743. Under the general law, licenses are required only of such persons as engage in and carry on the *business* of certain vocations, professions and employments. Code, 1876, § 490. Single acts are not licensed, but only a series of acts prosecuted with the intention of "reaping a profit or making a livelihood."—*Harris' case*, 50 Ala. 127; *Weil's case*, 52 Ala. 19. Besides, an act for this purpose was manifestly fruitless, as one already existed, imposing a license tax

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of one hundred dollars upon all persons undertaking "to act as an emigration agent," in the county of Montgomery, and other counties designated, which had been in force about two years when the statute in question was enacted.—Acts 1876-7, p. 225. If we could see that the legislative purpose was merely to impose a license tax upon persons engaged in the business or occupation of hiring persons to leave the State, we would not be justified in declaring the law violative of the constitution, because it *incidentally* affected the right of free egress from the State. A constitutional right is often affected in this way by the taxing power, without a repugnancy which will vitiate the tax. In *Osborne v. Mobile*, 16 Wall. 479, it was accordingly held that an annual license tax imposed by the city of Mobile on an express company, engaged in that city in carrying on an inter-state commerce, was not repugnant to the constitution as a regulation of commerce. So a tax imposed by the legislature of Pennsylvania upon the gross receipts of railroad and canal companies, doing business between that and other States, has been sustained as a proper exercise of the taxing power.—*State Tax on Railway Gross Receipts Case*, 15 Wall. 284.

A constitutional right, however, conferred by the Federal constitution, as such, can not be taxed by the States, either directly or indirectly, because the power to tax carries with it the power to defeat and render useless, if not to destroy. *Pollard v. State*, 65 Ala. 628; *McCullough v. Maryland*, 6 Wheat. 316. A law, as we have seen, would certainly be void which exacted tribute of a citizen as the price of crossing a State line. Does the license in question operate manifestly as a tax, by indirection, upon the right of the citizen to leave the State, or does it so burden this right as to effectually impair it? No principle of construction is sounder than the common sense and cardinal rule, that "what can not be done directly can not be done indirectly."—*Ex Parte Hardy*, 68 Ala. 303; *Cummings v. Missouri*, 4 Wall. 277. If the law should act upon any other theory, it would subject itself to the just challenge of catching *at shadows and not substances*. Hence, a constitutional right, though subject to regulation, "can not be impaired, or destroyed, under the device or guise of being regulated."—*South & North Ala. R. R. Co. v. Morris*, 65 Ala. 193.

It is easy to see the application of this principle in construing the statute now under review. Every person, including every laborer, has the right of egress from the State—the right to emigrate at his option, and in the unobstructed exercise of his free will. He has, therefore, the clear right to contract to exercise such right, because it may become a necessary and

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only means of its successful exercise. If the right itself exists and is lawful, it can not become unlawful to agree to exercise it.

It may be said, however, that no license is required of the laborer to contract, but *only of any one else to contract with him*. The fallacy of the suggestion is patent, as it requires at least *two parties* to every contract. A law forbidding the *purchase* of any commodity is in effect a law to prohibit its *sale*. In *Brown v. Maryland*, 12 Wheat. 419, it was said that a tax on the sale of an article, imported for sale, was a tax on the article itself. So it was decided in *Welton v. State of Missouri*, 91 U. S. 275, that a license tax required for the sale of goods was, in effect, a tax on the goods themselves. The license in that case was sought to be sustained as a tax upon a calling or occupation. In like manner a tax upon passenger carriers of a specific sum for each passenger transported has been adjudged to be a tax upon the passengers.—*Passenger Cases*, 7 How. (U. S.) 283; *Crandall v. Nevada*, 6 Wall. 35.

The legislative intent then is plain upon the face of the act. Its purpose is to prevent free egress of laborers, from the counties designated, out of the State. There is no tax upon the right of hiring or inducing them to go elsewhere. But a tax of two hundred and fifty dollars, in the form of a license, is exacted of every one who makes a contract with a laborer, or otherwise offers him an inducement to leave the State, whether for the service of the particular employer or hirer, or for that of other persons. The license required might thus amount to twice or three times the annual value of the hiring's labor. It requires no great draft upon judicial knowledge to declare that such a tax *is in its nature prohibitory*, and its natural effect, pursuant to its obvious purpose, is to seriously clog and impair the laborer's right of free emigration.—*Ex Parte Burnett*, 30 Ala. 461.

Construing the act under consideration by the test of these principles, we do not see how it can be sustained. It must be pronounced void as an indirect tax upon the citizen's right of free egress from the State, operating to hinder the exercise of his personal liberty, and seriously impair his freedom of emigration.—*Webber v. Virginia*, 103 U. S. 344; *Vines v. State*, 67 Ala. 73; *Passenger Cases*, *supra*.

There are other objections urged to this act besides the one we have above considered. It is ably assailed as a species of vicious *class legislation*, applicable alone to *laborers* and to no other persons in the community. It is also attacked as being repugnant to the Fourteenth Amendment of the Federal Constitution, the ground of objection being that it is a denial by the State to laborers, as a class, of "the *equal protection* of the laws." What force there may be in these objections we need

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not consider, as it is rendered entirely unnecessary in view of the conclusion to which we have come, pronouncing the law void for other and distinct reasons.

The judgment of the City Court is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

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Action against Warehouseman for Loss of Cotton destroyed by Fire.

1. *Warehousemen; duty and liability.*—Warehousemen, being of the class of bailees known as paid agents, exercising private employments, their liability and relation are essentially different from those of common carriers; their duty is to bring to the business in which they are employed reasonable skill and diligence, and they are answerable only for ordinary negligence, and may, by special contract, enlarge or narrow their liability as defined by law, except for losses caused by or through their own fraud.

2. *Same; when negligence imputed.*—The general rule is, that if a bailee of goods, liable only for losses occurring from his negligence, upon demand made, fails to re-deliver them, or does not account for a failure to make delivery, *prima facie*, negligence will be imputed to him; and the burden of proving a loss without the want of ordinary care is devolved upon him.

3. *Same; when burden of proof on bailor to show negligence.*—But where, as in this case, there is a full explanation of the failure to deliver on demand, and it is shown that the goods were lost by a cause not involving the bailee in liability, as by fire, the attending circumstances being known to the bailor before demand, and the demand being merely formal, it can not be presumed from the failure to deliver that the bailee has been wanting in care, or has been negligent, and his negligence was the proximate cause of the loss; and hence, upon the bailor, in a suit by him for damages resulting from the loss, rests the burden of offering some evidence tending to show that the defendant has been guilty of negligence, causing or contributing to the destruction of the goods.

4. *Same; measure of duty and liability not affected by care taken of their own property similarly situated.*—The liability of a warehouseman, for the safe care and custody of goods intrusted to his keeping, is not determined by the degree of care and diligence which he in fact bestows on his own goods similarly situated. Whether he is very careless and indifferent about his own goods, or is very prudent and diligent, in either case, the measure of his duty is, to bestow reasonable skill and ordinary diligence in regard to the property intrusted to his custody, to do all that men of ordinary prudence would do under like circumstances.

5. *Relevancy of evidence; general rule as to.*—The general rule in regard to the relevancy of evidence is, that no fact or circumstance ought to be received, which has not a direct tendency to the proof or disproof of the matters in issue; and hence, facts and circumstances which, when proved, are incapable of affording any reasonable presumption or inference touching the issues, ought to be excluded. If, however, it is ap-

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parent that the fact or circumstance has a tendency to elucidate the issue, however weak and inconclusive it may be of itself, evidence of it ought to be received, and its weight or sufficiency submitted to the jury under proper instructions from the court.

6. *Warehousemen; what not admissible as evidence of negligence.*—In an action against a warehouseman to recover damages for cotton stored and destroyed by fire, it being shown that the warehouse, a brick structure without a roof, located in the city of Eufaula, was burned, with the cotton stored therein, on Christmas night, and that the city authorities had previously refused to prohibit the explosion of crackers and like fireworks on the streets during the Christmas holidays, the plaintiff, after proof of facts tending to show that the explosion of such fireworks caused the burning of the warehouse and cotton, offered evidence that the defendant owned about seven hundred and fifty bales of the cotton stored in the warehouse, which was insured, and that, on the day before the fire, he obtained additional insurance on his cotton for three days only,—*held*, that the offered evidence was irrelevant and inadmissible, and that the primary court properly refused to allow it to go to the jury.

7. *Same; usage as to employment of watchman; when admissible.*—In such case, the particular want of diligence imputed to the defendant being the neglect on his part to employ a watchman to guard against the danger of fire in the night time, and especially during the nights when fireworks were exploded on the streets, evidence that the warehouse had been used for the storage of cotton for many years by a former owner, and that during the time of such use fireworks had been exploded in the streets, and a watchman had not been employed to guard or protect it, is competent, as tending to show that the defendant had exercised common or ordinary diligence.

8. *Opinion of witness as to combustibility of cotton; when admissible.* A witness, who is conversant with, and has had peculiar opportunities of observing, cotton, its nature and quality, and its liability to catch fire and burn, may express his opinion, in a case in which such opinion is relevant to the issues, that if a blazing missile, or a burning coal is applied to cotton, the cotton would thereby be fired immediately, and would burn with such rapidity that its extinguishment would be improbable, if not impossible.

APPEAL from Barbour Circuit Court.

Tried before Hon. H. D. CLAYTON.

This was a suit by David M. Seals against R. Q. Edmondson, to recover damages for the loss of twelve bales of cotton, which the plaintiff had stored with the defendant as a warehouseman, at a stipulated rate of storage, and which were destroyed by fire, on the night of 25th December, 1880, by reason of the alleged negligence and want of proper care and diligence on the part of the defendant. The defendant pleaded (1) the general issue; (2) "that by the contract under which the plaintiff stored the cotton, mentioned in the complaint, in defendant's warehouse, it was stipulated that said defendant was not to be responsible for the loss of said cotton by acts of Providence, or by fire, and that the said cotton was consumed by an accidental fire, for which defendant was in no way responsible;" and (3) the same facts as are alleged in the second plea, except the words, "for which defendant was in no way responsible," are omitted. A demurrer was interposed to the third plea, but it

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does not appear that it was passed on in the lower court. The trial was had on issue joined on the foregoing pleas, as appears from the judgment-entry, and resulted in a verdict and judgment for the defendant.

The plaintiff reserved several exceptions to the rulings of the court on the admissibility of evidence, and also to the giving, at the request of the defendant, of the following charge: "The question in this case is not what Edmondson, the defendant, might have done to prevent the fire, or to put out the fire, but the question is, did Edmondson fail to do anything which ordinary care required of him." The facts disclosed by the evidence, and the exceptions reserved in reference thereto, are sufficiently stated in the opinion.

The rulings of the Circuit Court on questions of evidence, and the charge given at defendant's request, are here assigned as error.

WATTS & SONS, for appellant, cited Story on Bailments, §§ 444, 549, 549a; Wharton on Neg., §§ 47-50, 569, 573, 576; *Hatchett v. Gibson*, 13 Ala. 587; *Hopkins v. M. & O. R. R. Co.*, 41 Ala. 486; *Hailey v. Falconer*, 32 Ala. 536; 1 Brick. Dig. p. 809, §§ 81-2; *Johnson v. State*, 17 Ala. 618; *Harrell v. Mitchell*, 61 Ala. 270; *Spiva v. Stapleton*, 38 Ala. 171; *Weaver v. Ala. Coal Min. Co.*, 35 Ala. 176; *Jones v. Fort*, 36 Ala. 449; *Gilmer v. City Council*, 26 Ala. 665.

G. L. COMER, S. H. DENT and PUGH & MERRILL, *contra*, cited *M. & G. R. R. Co. v. Prewitt*, 46 Ala. 63; *Ala. & Tenn. R. R. Co. v. Kidd*, 35 Ala. 209; Story on Bailments, §§ 23, 31, 62, 79, 450a, 456; *Gibson v. Hatchett & Bro.*, 24 Ala. 201; S. C., 13 Ala. 587; *Grey's Ex'r. v. Mobile Trade Co.*, 55 Ala. 387, and authorities cited; *Moore v. Mayor*, 1 Stew. 284; *Steele v. Townsend*, 37 Ala. 247; Story on Bailments (8th Ed.), §§ 549a, 549b, 30-35.

BRICKELL, C. J.—Warehousemen are of the class of bailees known as paid agents, exercising private employments, whose liability and relation is essentially different from that of common carriers. Their duty is to bring to the business in which they are employed reasonable skill and diligence, and they are answerable only for ordinary negligence.—*Moore v. Mayor*, 1 Stew. 284; *Hatchett v. Gibson*, 13 Ala. 587; S. C., 24 Ala. 201; *Jones v. Hatchett*, 14 Ala. 743. As they do not exercise a public employment; as they are at liberty to select their own customers, to accept only such business or service as they may choose, and to fix the measure of compensation to be paid for their services, they have the right by special contract

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to enlarge or to narrow their liability as, in the absence of contract, it is defined by law.—*Alexander v. Greene*, 3 Hill, (N. Y.) 9. The only limitation upon the powers of such a bailee, to protect himself against losses occurring in the course of his employment, seems to be, that he shall not stipulate for immunity from responsibility for his own fraud. “For the law will not tolerate such an indecency and immorality, as that a man shall contract to be safely dishonest. It, therefore, declares all such contracts utterly void; and holds the bailee liable, in the same manner and to the same extent, as if no such contract ever existed.”—Story on Bailments, § 32.

Whether the receipts given by the defendant, on the storage of the cotton, are to be deemed special contracts, and the clause found in them, “acts of Providence and fire excepted,” ought to be construed as a limitation of his liability, relieving him if losses occurred from these causes, unless he was guilty of fraud, though a want of ordinary diligence could be traced to him, does not appear to have been a matter of contention in the Circuit Court. The rulings of the court now assigned as error do not involve a consideration of the question. They seem to proceed upon the supposition that he was liable for ordinary negligence; liable if he had not exercised that degree of diligence which would be exercised by men of common prudence engaged in the like business, and under like circumstances.

The general rule is, that if a bailee of goods, liable only for losses occurring from his negligence, upon demand made, fails to redeliver them, or does not account for a failure to make delivery, *prima facie*, negligence will be imputed to him; and the burden of proving a loss without the want of ordinary care, is devolved upon him.—*Schmidt v. Blood*, 9 Wend. 268; *Platt v. Hibbard*, 7 Cowen, 500, note a; *Cass v. Boston & Lowell R. Co.*, 14 Allen, 448; *Clafin v. Meyer*, 75 N. Y. 260. The rule is founded upon necessity, and upon the presumption that a party who from his situation must have peculiar, if not exclusive knowledge of facts, if they exist, is best able to prove them. If the bailee, in whose possession and under whose care and control goods are, will not account for the refusal or failure to deliver them on demand of his principal, it is not a violent presumption, that he has wrongfully converted, or wrongfully retains them. Or if there was injury to, or loss of them during his possession, it is for him to show the circumstances, acquitting himself of a want of the care in keeping them it was his duty to bestow. But where, as in the present case, there is full explanation of the failure to deliver on demand, and it is shown that the goods have been lost by a cause not involving him in liability, as by fire, or by theft, or by the violence of nature, it can not be justly pronounced that he has been wanting in care

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—that he has been negligent, and his negligence was the proximate cause of the loss.—*Claflin v. Meyer, supra*; *Lamb v. Camden & Amboy R. R. Co.*, 46 N. Y. 271. But, as is observed in *Claflin v. Meyer, supra*, it must not be understood that a warehouseman or other bailee, bound to the duty of taking care of and delivering goods, can excuse a failure or refusal to deliver, or impose upon his principal any necessity of proof, by merely alleging as an excuse that they have been lost by causes which relieve him from liability, if he has not been negligent. The fact of the loss from such causes must appear with reasonable certainty, or his failure to deliver will be regarded as *prima facie* evidence of negligence.

It is in the light of these principles the questions arising in this case must be examined and decided. The loss of the cotton by fire, and the attending circumstances were known to the plaintiff before the demand for delivery, and the demand was merely formal; compliance with it was not expected, and was known to be impossible. Upon the plaintiff, therefore, rested the burden of offering some evidence tending to show that the defendant had been guilty of negligence, had been wanting in the care a prudent man in like circumstances would have taken of his own property, which caused or contributed to the destruction of the cotton. Having shown that the warehouse, a brick structure without a roof, was located in the city of Eufaula, and was burned with the cotton stored therein on the night of December 25th, 1880, the authorities of the city having refused to prohibit the explosion of crackers and like fireworks in the streets during the Christmas holidays, offered some evidence having a tendency to show that such explosions caused the burning of the warehouse and cotton. In this connection, evidence was offered that the defendant owned about seven hundred and fifty bales of the cotton stored in the warehouse, and had it covered by insurance; and on the day before the burning, he obtained additional insurance for three days only. The rejection of this evidence, on the objection of the defendant, forms the matter of the first and second exceptions.

The general rule in regard to the relevancy of evidence is, that no fact or circumstance ought to be received which has not a direct tendency to the proof or disproof of the matters in issue. Facts and circumstances, which, when proved, are incapable of affording any reasonable presumption or inference touching the issues, ought to be excluded. They serve to distract and divert the attention of the jury from the material facts and from the real issues, and lead to uncertainty and insecurity in the administration of justice.—*Magee v. Billingsley*, 3 Ala. 679; *Governor v. Campbell*, 17 Ala. 566. On the other hand, if it is apparent the fact or circumstance has a tendency

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to elucidate the issue, however weak and inconclusive it may be of itself, evidence of it ought to be received, and its sufficiency or weight submitted to the jury under proper instructions from the court.—1 Brick. Dig. 808–9, §§ 77–82. The inquiry is, whether this evidence was pertinent and had a tendency to show negligence or a want of ordinary diligence in taking care of the cotton, and protecting it from the danger of destruction by fire.

The argument in support of the relevancy of these facts is, that it indicates the apprehensiveness of the defendant that there was danger of loss or destruction by fire of goods stored in his warehouse, and the inference to be drawn is, that such apprehension required he should exercise a higher degree of diligence than would have been necessary if he had not indulged them. The duty of a bailee is dictated and measured by circumstances, and varies with them, of necessity. That which would be reasonable diligence at one time, in one locality, in the absence of impending danger, might at another time, in another locality, and in the presence of danger, become mere recklessness. The existence or standard of negligence or diligence is not, however, the degree of care which he may exercise in reference to his own property; nor is the presence or absence of hazards or perils to be determined by inquiring into indifference to them, or fearfulness or apprehensiveness of them. His power over his own property, the care which he employs in guarding it, is a matter about which he may exercise his own discretion, so long as he works no injury to the property of others—he may be indifferent or reckless, or he may exercise the highest prudence, and employ all proper and legal means to indemnify himself, if loss should occur. The measure of his duty is, to bestow reasonable skill and ordinary diligence in regard to the property entrusted to his custody—doing all that men of ordinary prudence would do under like circumstances, without regard to the care he may exert for himself. The insurance of his own cotton justified only the inference, that he preferred paying the premiums, rather than take upon himself the exclusive risk of its loss—that, in regard to his own interests, he exercised the highest degree of care and prudence. The plaintiff, to whom all the facts were known, could have been equally careful, and covered his cotton with insurance. For him, the defendant had no authority, without special instructions, to effect insurance. And if such instructions were given and were not obeyed, the liability of the defendant, if a loss occurred, would not have been for negligence as a bailee, but for the disobedience of instructions it was a duty to follow. If it be assumed, that the defendant was induced to take additional insurance for three days, because of his apprehensiveness of in-

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creased danger from loss by fire during that period, we repeat, it is not by inquiring into his apprehensions or fears, that the existence of danger is to be ascertained. They were not shared in, if he had them, by others who were as well informed of the facts from which it is supposed the danger arose. The city authorities, bound to the duty of protecting persons and property within the city, refused to prohibit the use and explosion of crackers and other like fireworks in the streets, the inference from which is, that they did not apprehend any special danger from them. The tendency of the evidence, if admitted, would have been the diversion of the attention of the jury from the main point and real issue in controversy, the degree of care the law enjoined upon the defendant, and whether he had exercised it, into an inquiry as to the degree of care he exercised touching his own property. That inquiry would have been as pertinent, if a loss had occurred from his negligence, and he justified or excused himself, because he was also negligent in taking care of his own property, and at the same time and from the same cause lost it.

The third, fourth and fifth exceptions involve the same question, and may be considered in connection. As a general rule, the mere opinions of a witness, not an expert, or his inferences or conclusions are not admissible evidence. The theory of the plaintiff was, that the cotton in the warehouse had been fired from the explosion of fireworks in the streets. The theory was combatted by the defendant, and he introduced evidence tending to show that the fire did not occur until some hours after these explosions had ceased. In this connection, witnesses who had been engaged in the cotton business, and had seen the burning of cotton, were permitted to state that if a blazing missile or a burning coal had been applied to the cotton, it would have been fired immediately, and burned with such rapidity that its extinguishment would have been improbable, if not impossible. This is the substance of the evidence, and we understand from the recitals in the bill of exceptions, that the witnesses had been engaged in the cotton business, that from their employment or pursuits they had peculiar opportunities of observing cotton, its nature and quality, and its liability to catch fire and burn; that cotton is peculiarly combustible—that it is its nature to take fire quickly, and to burn rapidly, is a fact to which any witness having knowledge of it may testify. The fact was involved in the evidence we are considering, and, without stating the fact itself, a witness could probably state the inference involved in it.—1 Whart. Ev. § 510. But how far this may be true, is not material, for the witnesses were peculiarly conversant with cotton, and with propriety could express an opinion as to its combustibility, and the difficulty of extinguishing fire

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burning it, as, after examination, they could, if material, have expressed an opinion as to its marketable grade or classification, and consequent value.—*Spiva v. Stapleton*, 38 Ala. 171; *City Council v. Gilmer*, 33 Ala. 133.

The sixth exception involves the admissibility of evidence that the warehouse had been used for the storage of cotton for many years by a former owner; that during the time of its use fire missiles had been shot off in the streets, and a watchman had not been employed to guard or protect it. We can perceive no just objection to this evidence. The particular want of diligence imputed to the defendant, was the neglect to employ a watchman to guard against the danger of fire in the night time, and especially during the nights when there was the explosion of fireworks in the streets. If such had not been the usage, the fact was material in determining whether a want of common or ordinary diligence could be imputed to the defendant. Common or ordinary diligence, in the sense of the law, is said by Judge Story to be the common prudence men generally exercise about their own affairs in the age and country in which they live.—Story on Bailm. § 11. It is only under peculiar circumstances that a bailee can be regarded as negligent, if he employs the diligence which is employed by others, engaged in the same business, in the same community with himself.

The charge given by the Circuit Court may be subject to some criticism, but it expresses the proper criterion of the liability of the defendant—a failure or an omission to do any thing which ordinary care required of him.

We find no error in the record, and the judgment must be affirmed.

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Action on Policy of Fire Insurance.

1. *Fire insurance; validity of parol contract of.*—A valid contract of fire insurance may be made in parol; and an action at law may be maintained on an agreement to insure, if all the terms were agreed on, so as to cover the time of the loss, and the breach consists in the failure to issue the policy.

2. *Same; when agreement to insure void for uncertainty.*—A parol agreement to insure against loss by fire, which fixes the subject and sum of insurance, but is silent as to the rate of insurance, the duration of the policy, the payment of the premium or other material stipulations, is, by

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itself and unaided by previous dealings between the parties, void for uncertainty.

3. *Same; when verbal agreement to insure aided by previous policies.* But where the agreement relates to insurance on merchandise and household goods in the storehouse of the party seeking the insurance, and he had previously obtained two annual policies on merchandise in the same storehouse, from the same agent, and in the same insurance company, as these former dealings between the parties showed the house in which the merchandise covered by the policies was kept, the rate of premium, the time for which the insurance had been obtained, and the many stipulations and details embodied in the policies, proof thereof would authorize the inference, that when the insurance was applied for, and the agent agreed to issue the policy, all the previous terms were impliedly understood and adopted, except in so far as they were modified by the express terms of the verbal agreement; and hence, in a suit on the agreement to insure, after a loss by fire, the two former policies are admissible in evidence in aid of the agreement.

4. *Secondary evidence of contents of policy of insurance; recollection can not be refreshed by policy previously issued.*—Plaintiff declared on a verbal agreement to insure merchandise and household goods against loss by fire, and also on policy filled up and signed in pursuance of the verbal agreement, but after the loss and in ignorance of it, which was put by the defendant's agent in his safe, in which he had kept policies issued by defendant to the plaintiff for previous years, covering merchandise in the same storehouse. On the day after the fire plaintiff informed defendant's agent, at his office, that the property insured had been destroyed by fire, when he was shown the policy which had been filled up and signed, and plaintiff then read it and handed it back to the agent, and never afterwards saw it. On the trial, the defendant having failed to produce the policy on notice, the plaintiff was examined in his own behalf as to its contents, and was allowed by the court, against defendant's objection, to look at one of the policies previously issued, and to testify that it corresponded with the one not produced, and in that way to prove the contents thereof. *Held*, that the court erred in allowing plaintiff to thus refresh his recollection, and in allowing him thus to prove the contents of the policy.

5. *When party on whom notice to produce paper writing can not offer parol evidence of its contents contradictory to that offered by opposite party.* In such case, the defendant having failed to produce on the trial the policy so signed and filled up, and to account for its absence, and the plaintiff having testified to its contents, the defendant can not be allowed to offer parol proof thereof different from that stated by the plaintiff, either for the purpose of showing what the true terms and provisions of the policy were, or for the purpose of contradicting the plaintiff.

6. *Fire insurance; recovery on policy issued after loss, in pursuance of prior parol agreement.*—If an application for insurance against loss by fire is made, and the terms agreed on prior to the loss, but the policy is not issued until after the loss, and the policy is so framed as to make the risk take effect from the date of the application, then a recovery may be had on the policy; but if, as in this case, the policy was not dated, and, on its face, was not made to take effect at any time, prior to its issue, there can be no recovery on the policy, on proof of an anterior parol agreement variant from, and not carried into the policy.

7. *Parol agreement to insure against loss by fire; when loss covered by.* A valid parol agreement made with a fire insurance company in October, that a policy for twelve months should be issued in the *early* part of November, would, *ex vi terminorum*, cover a loss occurring on the morning of the 19th of November.

8. *Fire insurance; when preliminary proof waived.*—Letters written by the general agent, and by the resident agent of a foreign fire insurance

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company to the insured, notifying him that the company refused to pay the loss, placing the refusal on the express ground that there was no insurance on the property when it was destroyed, and making no allusion to the sufficiency or insufficiency of the preliminary proof of loss, are competent evidence to go to the jury, in a suit by the insured against the insurance company to recover the amount of insurance, on the question of a waiver of further preliminary proof, or of an implied admission that such proof was sufficient.

9. *Same; interest on.*—Where, by the terms of a contract of fire insurance, the insurance money is payable only at the expiration of two months after proof of loss, interest can not begin to run until that time has elapsed; and, in such case, the time when the proof of loss is furnished, is a question of fact, to be proved by the jury, and should be left to them by an appropriate charge.

10. *Fire insurance; limitation of risk to three-fourths of cash value.* Under a clause in a policy of fire insurance that “in the event of loss by fire, the company should not be liable for more than three-fourths of the actual cash market value of the property insured, immediately prior to the loss,” the assured carries one-fourth of the risk, and can not recover, in the event of a loss, more than three-fourths of the actual cash market value of the insured property that was destroyed; and such policy covering two classes of property in the same house, insuring each class for a stated amount, neither class, if deficient in value, can be supplemented by excessive loss on the other.

11. *Unpaid premium a credit on amount recoverable on policy.*—In an action on a policy of fire insurance, the defendant is entitled to a credit for unpaid premium.

APPEAL from City Court of Selma.

Tried before Hon. JONATHAN HARALSON.

The nature of this suit, and most of the material facts disclosed by the record, are sufficiently stated in the opinion; and it is only necessary to here make the following supplemental statement: The first policy issued, dated September 30th, 1876, and numbered 174, was turned over to the plaintiff by Kayser, defendant's agent at Selma, after the loss; the second policy, dated November 5th, 1877, and numbered 281, and the third policy, dated November 19th, 1878, and numbered 388, were returned by Kayser to the defendant's general agents, at Atlanta, Georgia, the first of these, in January, 1878, as cancelled, and the other, after the loss, as having been issued after the property insured was destroyed, and, therefore, as inoperative. Neither of these two last mentioned policies was produced on the trial, and the only proof offered, accounting for their absence, was that neither Kayser nor the defendant's attorneys had them in their possession. The plaintiff, who was examined as a witness in his own behalf, in testifying touching the contents of these two policies, stated, in substance, that the policy first issued differed from the policy dated November 19th, 1878, among other things, in that the latter policy did not contain the following provision, which was in the former: “It being understood and agreed that, in the event of loss by fire under this policy, this company shall not be liable for more than three-fourths of

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the actual cash market value of the property hereby insured, immediately prior to such loss." The defendant offered to prove by Kayser, who was examined by it as a witness, that this clause was in the policy of November 19th, 1878, but the plaintiff objected to the offered proof, on the ground that the policy had not been produced by the defendant as required by notice duly served upon it, and that it could not, therefore, offer parol proof as to the contents of said policy, or any part thereof. The court sustained the plaintiff's objection, and refused to allow the proof to be made, and the defendant excepted. The defendant then offered to make the same proof solely for the purpose of contradicting the plaintiff, but the court, on plaintiff's objection, refused to allow it, and the defendant excepted.

The plaintiff testified that "soon after the fire and before the commencement of this suit, he made out and furnished defendant with proof of his loss by said fire, and that no objection had been made as to the form or sufficiency of said proof." The exact date when this proof was made, is not shown, nor was it introduced in evidence. In this connection he also testified that he received two letters, one from Kayser, and the other from J. E. Johnston & Co., the defendant's general agents, both of which were introduced in evidence, against the defendant's objection. The contents of these letters are sufficiently indicated in the opinion. The plaintiff further testified that the value of the stock of goods insured and destroyed by the fire was between \$3,000 and \$4,000, and that he estimated the value of the household goods insured and destroyed at \$500 or \$600.

The court, in its general charge, instructed the jury, *inter alia*, as follows: (1) "That if the plaintiff is entitled to recover, he is entitled to interest from the date of the letter from J. E. Johnston & Co. to the plaintiff, read in evidence." (2) "That if the plaintiff is entitled to recover, he is entitled to recover such damages as he sustained by the fire, not exceeding the amount of the policy on which they may give damages, or the amount of the agreement to insure." (3) In substance, that although the policy of November 19th, 1878, was issued after the fire, yet, if it was agreed between the parties that the policy should have been issued before the fire, then the plaintiff may recover on that policy. To each of these instructions the defendant excepted.

The defendant also reserved exceptions to the refusal of the court to give the following, among other, charges requested by it in writing: (1) "If you find from the evidence that the defendant issued to plaintiff a policy numbered 388 for \$1,500, as described by the plaintiff, on the 19th day of November, 1878,

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with risk to commence on the 19th day of November, 1878, to continue for one year; and if they further find that before said policy was written, the property described in that policy as insured was destroyed by fire, then the plaintiff can not recover in this action on that policy of insurance." (2) "If the jury find from the evidence that the defendant issued to plaintiff a policy numbered 281 for \$2,000, as described by the plaintiff, on the 5th day of November, 1877, with the risk to commence on the 5th day of November, 1877, to continue for one year; and if they further find after the expiration of the policy, to-wit: after the 5th day of November, 1878, the property described in that policy as insured was destroyed by fire, then the plaintiff can not recover in this action on that policy of insurance." (3) "If the jury believe from the evidence that on or about the 19th day of October, 1878, the plaintiff and A. Kayser, as the agent of the defendant, entered into an agreement, whereby the said Kayser agreed for and on behalf of the defendant to issue to the plaintiff a policy of insurance on the stock of goods and the other personal property described in the evidence for \$1,500; but that the time when said policy was to be issued was not definitely agreed on, but it was to be issued at some time in the early part of November 1878; and if they further believe from the evidence that the amount of the premium was not agreed upon at the time, and that there was no agreement as to the period of time to be covered by the policy, then said agreement was incomplete and not binding either upon the plaintiff or defendant; and if the jury further find from the evidence that policy No. 388 for \$1,500, was not issued until the 19th day of November, 1878, and after the property described in said policy as insured was destroyed by fire, although it was destroyed on the same day the policy was issued, then the plaintiff can not recover on said policy."

The rulings of the City Court above noted are among the assignments of error here made.

PETTUS & DAWSON, for appellant.—(1) It is not denied that a verbal contract of insurance may be made, and a recovery had thereon; nor is it contended that parties may not make a valid contract for a policy to be issued at a future day, if all the terms of the policy to be issued, and the *time* when it is to be issued are agreed on. But if such agreement be made, and no policy is issued until after the property is destroyed, it is insisted that, although a recovery may be had on the contract to issue the policy, none can be had *on the policy issued*.—19 How. (U. S.) 318. (2) All the terms of a parol contract to insure must be agreed on by the contracting parties, or else the contract is incomplete.—May on Ins. p. 41, § 43. (3) The letters

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written by J. E. Johnston & Co. and by Kayser to plaintiff were not admissible for the purpose for which they were offered. They were irrelevant, because no question was raised in the case as to proof of loss. (4) The court erred in allowing plaintiff, when examined as a witness, to look at the first policy issued, and to testify that it corresponded with the other two. Best on Ev. § 483. (5) The refusal of the court to permit the witness Kayser to testify to the contents of policy No. 388, especially for the purpose of contradicting the plaintiff on that point, was error. It may be that the defendant, having failed to produce the policy, could not, as original evidence for itself, prove by parol the contents of the policy; but the question did not so arise. The plaintiff, as a witness for himself, had testified as to the contents of the policy, and, in such case, the defendant had a right to rebut parol evidence by parol evidence. (6) The charge as to the amount of damages is clearly erroneous. There were several contracts sued on, one being the policy issued on 19th November, 1878, for \$1,500. This policy *separates* the amount of insurance, placing part of it on the merchandise, and part on household goods; but the charge blends the two amounts into one sum, and spreads it over *all things insured*. (7) The charge of the court as to the date when interest commenced to run was clearly an invasion of the province of the jury. The loss was payable *sixty days after* notice and proof of loss. When this time expired, and when the letter referred to in the charge was written, were questions for the jury. Besides, the letter was read in evidence solely for the purpose of showing a waiver of proof of loss. If it amounted to such waiver, then interest would commence, not at the date of the waiver, but sixty days thereafter.

BROOKS & ROY, *contra*.—(1) To perfect a contract of insurance, “it is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, the amount and the rate of the insurance are ascertained or *understood*, and the premium paid, if demanded;” and if all the terms are not specified, “it will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or as have been used before between the parties.”—*Eames v. Home Ins. Co.*, 4 Otto, 621; May on Ins. § 1, 3. (2) And a parol contract of insurance is as valid and binding as if in writing.—May on Ins. §§ 14, 23–4; *Ins. Co. v. McMillan*, 31 Ala. 711; *Ala. Gold Life Ins. Co. v. Mayes*, 61 Ala. 163. (3) Credit may be given for the premium; and it may be arranged in a running account, taken in trade, paid by the agent himself, or in any other way agreed upon. “The obligation to pay the premium is the pre-

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mium."—*Sheldon v. Ins. Co.*, 25 Conn. 207; May on Ins. § 360; *Ins. Co. v. Colt*, 20 Wall. 560. (4) Where a policy has been filled out in pursuance of a preliminary agreement to insure, the assured may sue and recover upon the policy itself, though it was written after the loss occurred, and has never been delivered, but has remained in the possession of the insurer all the while.—*Ins. Co. v. Colt*, 20 Wall. 560; May on Ins. §§ 43–5, 60; *Kohne v. Ins. Co.*, 1 Wash. (C. C.) 93; *Lightbody v. Ins. Co.*, 23 Wend. 18; *Davenport v. Ins. Co.*, 17 Iowa, 276; *Sheldon v. Ins. Co.*, 25 Conn. 207. (5) Or the assured may proceed in various modes to enforce the parol contract of insurance, irrespective of the writing.—May on Ins. §§ 565, 43–4; 31 Ala. 712; 20 Wall. 560; 4 Otto, 621; 18 Barb. 69; 16 Gray, 448. (6) The assured can maintain his action for damages for the breach of the agreement to insure, as in the 6th count in the case at bar.—31 Ala. 712; 18 Barb. 69; 9 How. 390. (7) An agent authorized to take risks, effect insurance, and make contracts in that behalf, especially when so acting in this State for a foreign corporation, is a general agent, and the defendant is as much bound by his acts and declarations in the premises as if they proceeded from the principal.—Con., Code, 1876, p. 148, § 4; May on Ins. § 151; 20 Wall. 560; 16 Gray, 454; 25 Conn. 221; 58 Ala. 485. (8) The mode of proof of the contents of the policy adopted was the only one practicable of so voluminous a document, and defendant's objections were properly overruled.—4 Otto, 629; 28 Ala. 213. (9) The letters introduced in evidence were competent for the purpose of showing that defendant had waived any objection to the form or sufficiency of the proofs of loss.—*Ins. Co. v. Crandall*, 33 Ala. 9. (10) The defendant, having failed to produce the original policy numbered 388, could not offer secondary evidence of its contents. The rule in such cases is so strict, that "after notice and refusal to produce a paper, and secondary evidence given of its contents, the adverse party can not afterwards produce the document as his own evidence."—1 Greenl. on Ev. p. 600, and notes; §§ 530–3; *Doe v. Hodgson*, 12 Ad. & El. 135; 40 Com. Law, p. 44; *Bogart v. Brown*, 5 Pick. 18; 4 Ala. 159; 28 Ala. 200.

STONE, J.—The appellee—plaintiff below—a resident of Wilcox county, was engaged in merchandise, and obtained insurance on his goods from the appellant, through Kayser, their agent, who had his office in Selma, Alabama. The plaintiff, Adler, had previously obtained two policies from the same company and through the same agent, insuring merchandise in the same storehouse. The first of these policies was issued September 30th, 1876, and expired twelve months afterwards. The sum of insurance secured by this policy was three thousand dol-

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lars, and the agreed premium was $2\frac{1}{2}$ *per cent.* The second policy was issued November 5, 1877, and expired at noon, November 5, 1878; amount insured two thousand dollars, and rate of premium $2\frac{1}{2}$ *per cent.* A third policy was filled up and signed by Kayser, the agent, dated November 19th, 1878, to run for twelve months from 12 o'clock noon of that day. The insurance provided by this policy was fifteen hundred dollars—twelve hundred on the merchandise, and three hundred on the furniture of the assured, who had his residence in the building in which he kept and sold his merchandise; rate of premium the same— $2\frac{1}{2}$ *per cent.* It was proved, and not denied, that Adler, the assured, left his policies of 1876 and 1877 in the custody of Kayser, the agent, for safe keeping, and that the latter kept them locked up in his safe. It will thus be seen that from noon November 5th, 1878, to the 19th day of that month, there was no written policy insuring Adler's merchandise. The store and merchandise, and dwelling and most of the furniture were destroyed by fire about an hour before daybreak on the morning of November 19th, 1878. This was before the policy of that date, for fifteen hundred dollars, was filled up and signed by the agent, Kayser; but the latter did not know of the burning, until after he had so filled up and signed the policy. The present suit is brought to recover for the alleged loss of the merchandise and furniture.

The complaint in the present action contains six counts. The first count claims damages on an alleged policy of insurance issued by the defendant company November 5th, 1878, insuring goods, wares and merchandise for one year. The second count claims damages on an alleged agreement of defendant, through its agent, to issue to plaintiff a policy on his merchandise for the same sum, to bear date November 5th, 1878, and to run one year; and that defendant failed and neglected to issue the policy. The third count is on an alleged insurance of two thousand dollars on merchandise, commencing on same date, November 5th, and running one year, without stating the form in which the contract was entered into. The fourth count charges that defendant corporation insured plaintiff's merchandise in the sum of two thousand dollars, by its policy issued November 5th, 1877, and to run one year, and agreed to renew the said policy for one year, commencing November 5th, 1878, but failed and neglected to issue the renewal policy. The fifth count, like the third, avers a contract of insurance to commence November 5th, 1878, and to run one year, but fails to charge whether the contract was in writing or not. The sum averred in this count to have been insured is fifteen hundred dollars, on "goods, wares and merchandise, household furniture, bedding and wearing apparel." The sixth count, like the second, de-

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clares on an agreement to issue a policy, to bear date and run from November 5th, and a neglect and failure to do so; the amount and subject of insurance the same as in the fifth count. Each of these counts avers a consideration, and a loss by the burning, greater in amount than the sum insured. The defendant took issue on the several counts, and does not here question the sufficiency of either. On the contrary, counsel admit that a valid contract of insurance may be made in parol, if all the terms be agreed on. Such certainly is the law.—*Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 31 Ala. 711; *Ala. G. L. Ins. Co. v. Mayes*, 61 Ala. 163. Some of the adjudged cases—perhaps a majority of them—arose on bills in equity, praying, first, specific performance of the agreement to issue the insurance policy. Under these bills, the court having acquired jurisdiction for the alleged purpose of specific performance, retained the cases, as is its wont, and granted to complainants complete redress—such as they would have been entitled to in suits on the policies, if remitted to the law forum.—*Eames v. Home Ins. Co.*, 94 U. S. 621; *Taylor v. Mer. Fire Ins. Co.*, 9 How. (U. S.) 390; *Com. Mut. Ins. Co. v. Un. Mut. Ins. Co.*, 19 How. (U. S.) 318; *Ala. Gold Life Ins. Co. v. Mayes*, 61 Ala. 163. We need not inquire whether, in the absence of a special equity, a bill should be entertained for the specific performance of a contract in relation to personalty. That question does not arise in this cause. As we have said, counsel in this case admit an action at law may be maintained, if all the terms of the contract were agreed upon, so as to cover the *time* of the loss, and the breach consisted in the failure to issue the policy, as agreed on. Many authorities sustain this view, and we think them sound.—*Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 31 Ala. 711; May on Ins. §§ 43 *et seq.*; *Ib.* § 565; *Ins. Co. v. Colt*, 20 Wall. 560; *Sanborn v. Fireman's Ins. Co.*, 16 Gray, 448; *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 207; *First Bap. Ch. v. Brooklyn Fire Ins. Co.*, 18 Barb. 69.

As we have shown, the complaint in the present cause states the plaintiff's claim in almost every conceivable form: On the policy, as if issued, on an agreement to renew a policy previously issued which expired before the loss, and on an agreement to issue a new policy, differing somewhat from the former one in the subject and amount insured. The policy issued November 5, 1877, and expiring November 5, 1878, was for two thousand dollars insurance on merchandise. If there was any agreement to insure for the next year, that agreement was entered into between Adler and Kayser, the agent, about October 20th, 1878. Adler and Kayser agree in fixing this as the time. They do not agree in their statement of the subject, or the amount of the insurance. Adler states it was to be a policy insuring his

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merchandise to the extent of two thousand dollars; in effect, a counterpart or renewal of the policy of 1877. Kayser states the subject and sum of the insurance, pretty much as the same are set forth in the fifth and sixth counts of the complaint. The finding of the jury indicates that they fixed the amount of their verdict at Kayser's figures. Adler and Kayser agree substantially in this: That, about October 20th, 1878, there was an agreement between them that the defendant insurance company would issue to the plaintiff a policy of insurance, to be issued in the early part of November then following. Sterne, another witness, proves substantially the same thing. We have shown above wherein they differed as to subject and sum. It is not shown that in the alleged agreement of October 20th any thing was said as to the rate of premium, the duration of the policy, or of the payment of the premium. Nor does it appear that any of the stipulations or details of the policy were agreed upon, or mentioned. It is here contended that because the terms and details were not agreed upon, and because the premium was not prepaid, there was no contract made, and there can be no recovery in this action. Such would doubtless be the case, if there had been no previous dealings between them. In this connection comes in the question of the admissibility of the former policies as evidence. It will be borne in mind that Adler, the plaintiff, had previously obtained two policies of insurance on the goods in the same storehouse, from the same agent, and in the same insurance company—"The Home Insurance Company" of New York. The first policy was issued in 1876, and the second on the 5th November, 1877; each, by their terms, to run a year. It was testified, both by Adler and Kayser, that the premium was not required to be paid, nor was in fact paid in advance. The premium on the policy first issued was afterwards paid in full, in a settlement had between Adler and Kayser. The testimony tends to show that the matter of credit on the premiums rested in a private understanding between Adler and Kayser, the agent, and the latter was in the habit of paying them, and of trusting Adler for reimbursement. They had private dealings with each other at the time. There was contradictory testimony as to notice to Adler, requiring payment of the premium on the second policy. Kayser testifies that policy was cancelled for non-payment of premium, on the 5th of January, 1878, and that Adler paid for only the two months covered by the policy, before it was cancelled. Adler's testimony tended to show he had paid the whole premium, and he denied all notice or knowledge that any step would be, or was taken for the cancellation of the policy. It was proved, and admitted by Kayser, that long after the alleged cancellation he, Kayser, admitted to Sterne, who was about to sell Adler a

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bill of goods, that the merchandise of the latter was under insurance. He added, the policy was about to expire, which tends to show he had reference to the policy of 1877, which would, by its terms, expire some fourteen days afterwards. This was the policy Kayser testified had been cancelled nine or ten months previously. We can not perceive how the question of the cancellation *vel non* of this policy can exert any influence in the determination of this suit, except that it may have some bearing on the credibility of the testimony. It constituted a part of the history of the transaction, and, as such, it was perhaps legitimate testimony.

The conversation alleged to have taken place between Adler and Kayser, about October 20, 1878, would not, unaided, amount to a valid contract of insurance, or agreement to insure. It wanted very many essential details. There was no mention of the place or house in which the goods were to be insured, of the rate of premium, or where to be paid, or of the duration of the policy, or of many other stipulations and details found in such policies. Looking alone to that conversation, we can not affirm all the terms necessary to consummate such contract were agreed upon. But the parties had had previous dealings in relation to a subject-matter identical in principle. Those dealings showed in what place and house the merchandise was kept, which was covered by the former policies, the rate of premium paid, or to be paid, the length of time—one year—the policy would run, and the many specifications and details embodied in the policies. They also tended to show that in prior dealings between these parties, pre-payment of premium had not been exacted. Proof of these previous dealings would authorize the inference that when Adler requested insurance, and Kayser agreed to issue the policy early in November, all the previous terms were impliedly understood and adopted, except to the extent they expressed and agreed otherwise. The former policies were clearly admissible in evidence. *Harkins v. Pope*, 10 Ala. 493; *Crommelin v. Thiess*, 31 Ala. 412; *Rainey v. Capps*, 22 Ala. 288; *Wolffe v. Wolffe*, 69 Ala. 549.

There was another use permitted to be made of the policy of 1876, which was the subject of exception. After the destruction of the goods by fire, but later on the same day, Kayser, the agent, filled up and signed a policy, corresponding to that described in the fifth and sixth counts in the complaint. This he did in ignorance that the goods had been destroyed. He deposited it in his safe. The policies previously issued to Adler had been, at his request, similarly deposited and kept. On the day after the fire, Adler informed Kayser, at his office, that the goods had been burned. The policy was then shown to

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Adler, and he testified that he read it. He then handed it back to Kayser, and never afterwards saw it. Notice had been properly served on defendant to produce this policy, and also the one issued in 1877. They were not produced, and Adler was examined as to their contents. In giving his evidence, he was allowed to look at the policy of 1876, which he testified corresponded with the other two, and, in that way, to state the contents of those not produced. In *Acklen v. Hickman*, 63 Ala. 494, we defined two classes of cases, in which a witness may use a memorandum made by him, or known to him to be correct. The present case is scarcely shown to fall within either class.—See *Mims v. Sturdevant*, 36 Ala. 636; 1 Greenl. on Ev. §§ 436–7. Nor does this case fall within Mr. Greenleaf's third class.—*Ib.* § 437.

Can there be a recovery on either of the written policies? We have shown that one of the policies—the second—expired at 12 o'clock noon, November 5, 1878. The third and last policy was issued November 19, 1878, and insured the merchandise and goods from 12 noon of that day. Between these dates the goods were burned. There are cases where an application for insurance is made, and the terms agreed on, but the policy is not issued until after the property is destroyed, some time afterwards. In such case, if the policy be so framed as to make the risk take effect from the date of the application—a time before the loss—then a recovery may be had on the policy. This is clearly right, for the policy is but the written evidence of a contract previously entered into.—May on Insurance, § 44; *Ins. Co v. Colt*, 20 Wall. 560; *Sheldon v. Com. Mut. L. Ins. Co.*, 25 Conn. 207; *Lightbody v. Nor. Amer. Ins. Co.*, 23 Wend. 18; *City of Davenport v. P. Fire & Marine Ins. Co.*, 17 Iowa, 276. The present case, however, is different. The policy was not dated, nor, on its face, was it made to take effect at any time before it was issued. The property claimed to have been insured was burned before the date or issue of the policy. Actions at law, founded on written instruments, can be maintained only on the terms expressed, or interpreted to be expressed or implied in the instrument itself. Parol proof of an anterior agreement, variant from, and not carried into the instrument, can not, in a suit at law on the writing, be the basis of a recovery. There can be no recovery on the facts of this case on either of the written policies shown in the testimony. We may add, however, that if, under the rules stated above, there was an agreement that a policy should be issued in the *early* part of November, that would, *ex vi terminorum*, have been in time to cover a loss occurring on the morning of the 19th November.

Objection was made to the admissibility in evidence of two

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letters; one from Kayser, the agent at Selma, and the other from the general southern agency of the insurance company at Atlanta, Georgia. These letters gave notice to Adler of a refusal of the company to pay the alleged loss. They placed the refusal on the express ground, that there was no insurance on the goods when they were destroyed. They made no allusion to the sufficiency or insufficiency of the preliminary proofs of loss. They were competent evidence to go to the jury on the question of waiver of further preliminary proof, or of an implied admission that such proof was sufficient.—May on Insurance, § 569. And such refusal to pay by the resident agent of a foreign insurance company should have the same effect, direct and incidental, as if made by the company itself.—Code of 1876, § 1434; *Piedmont & Atl. Life Ins. Co. v. Young*, 58 Ala. 476.

The court did not err in refusing to allow defendant to make oral proof of the contents of the written policy, or any part of it. There was no proof of its loss or destruction, or that defendant lay under any disability to produce the policy itself.

The insurance money, if payable at all, was due and payable at the expiration of two months after proof of loss. Interest could not begin to run till then. When the proof of loss was furnished, was a question of fact to be found by the jury, and should have been left to them in an appropriate charge.

One of the terms of the policy of 1876 was, "that in the event of loss by fire, the company should not be liable for more than three-fourths of the actual cash market value of the property insured, immediately prior to the loss." If the terms of the insurance agreed to be taken by the company in the early part of November, 1878, as alleged, were to be, in all non-expressed particulars, the same as those found in the policy of 1876, then this clause should have been given in charge to the jury. The purpose and policy of such clause are, that the assured shall carry one-fourth of the risk. It follows that the plaintiff could not recover for the loss he sustained by the burning more than three-fourths of the actual cash market value of the insured goods that were burned. And this should be stated distributively. The goods, wares and merchandise, it is charged, were insured for twelve hundred dollars. To justify a recovery on this account for the full sum, their actual cash market value, immediately prior to the loss, must have been sixteen hundred dollars. Falling below that sum, the recovery on this account should be scaled down correspondingly. So of the three hundred dollars risk on the furniture, bedding and wearing apparel. To justify a full recovery on this clause, the loss at cash market value must, immediately prior to the burning, have been as much as four hundred dollars. And neither class,

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if deficient in cash market value, can be supplemented by excessive loss on the other class. It should be stated, that if defendant is held liable, a credit should be allowed for the unpaid premium.

Several rulings of the City Court were opposed to these views. We need not specify them.

Reversed and remanded.

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Statutory Real Action in the Nature of Ejectment.

1. *Sale of lands for taxes; validity of; by what law governed.*—The validity of a sale of lands for the payment of delinquent taxes must be determined by the law of force at the time the sale was made.

2. *Same; jurisdiction of probate court to order, limited, and must appear of record.*—The probate court being a court of limited jurisdiction in the matter of the sale of lands for the payment of delinquent taxes under the provisions of the act of February 12th, 1879 (Pamph. Acts, 1878-9, p. 1), to sustain such a sale, it must affirmatively appear of record that the court had jurisdiction both of the subject-matter and of the person.

3. *Same; when jurisdiction of the person sufficiently appears.*—A judgment entry of the probate court, subjecting lands of a non-resident to sale for the payment of delinquent taxes, which, following the form prescribed by statute, recites that "notice has been given as required by law, is sufficient under the act," although under its express provisions, the land-owner was entitled to notice by publication in a newspaper published in the county in which the lands lie.

4. *Same; judgment can not be collaterally assailed for mere irregularities.*—While great accuracy is exacted, and strict rules are applied for the protection of the tax-payer, such proceedings are not exempted from the influence of the principle forbidding the collateral assailable of judgments for mere irregularities, or on any ground which could have been pleaded in defense.

5. *Same; judgment conclusive as to defenses which could have been made on the trial.*—While it would have been a full defense to such a proceeding, if it had been shown on the trial that the tax-payer, or any one for him, had tendered to the collector the full amount of the delinquent taxes due by him, or that he had in his possession, in the county, a sufficient amount of visible personal property, out of which the taxes might have been realized by the collector, the failure to make these defenses in the probate court is conclusive on him and those holding under him; and the judgment of condemnation can not afterwards be collaterally assailed on either of these grounds.

6. *Lien of the State on lands for taxes; extent of; when tender insufficient.*—The State has, under the statute, a preferred lien on the lands of a tax-payer for all unpaid taxes; and hence, a tender by such tax-payer of the amount of the taxes due on the lands, without including the owner's poll-tax, and the delinquent taxes due on his personal property, is insufficient, and will not constitute a defense to proceedings in the

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probate court to condemn the lands for the payment of the delinquent taxes due by him.

7. *Same; when it attaches; not affected by subsequent alienation.*—The lien of the State for taxes attaches to lands under the statute (Code, § 375) on the first day of January of the year for which they were assessed; and it is not affected by a subsequent alienation, although made prior to a sale for the payment of the taxes, and to a *bona fide* purchaser for value, and without notice.

8. *Sale of lands for taxes; when description sufficient.*—Where lands are described in the assessment list and in the proceedings in the probate court to subject them, under the statute, to sale for the payment of delinquent taxes “as two hundred acres, known as the lands of the late Israel Wiggins, deceased,” the description is sufficient, parol evidence being allowed in aid of identification.

9. *Same; when void for uncertainty of description.*—An assessment of lands for taxes, in which the lands are described as “two hundred acres of land lying in Dale county,” is void for uncertainty; and proceedings in the probate court to subject the lands to sale for the payment of the taxes, based on such assessment, are also void.

10. *Same; description in assessment list can not be varied.*—The jurisdiction of the probate court in such case depending upon the validity of the assessment, and the statute requiring that the sale must be made according to the description contained in the assessment list, which description must be copied in the docket filed by the collector with the probate judge, a description in such list and docket which renders the assessment void, can not be aided by a more perfect description in the judgment of condemnation, and subsequent proceedings.

APPEAL from Dale Circuit Court.

Tried before Hon. H. D. CLAYTON.

This was a statutory real action in the nature of ejectment, brought by J. W. Cassady against LaFayette Driggers, and was commenced on 17th June, 1881. The cause was tried on issue joined on the plea of not guilty, the trial resulting in a verdict and judgment for the plaintiff. Both parties claimed title under one D. J. Hargrove, the plaintiff, through a tax sale and deed made by the judge of probate in pursuance thereof, and the defendant, by deed from said Hargrove and wife to one W. S. Oates, dated October 18th, 1878, and by subsequent deed from said Oates and wife to defendant. The evidence introduced on the trial, and the exceptions reserved in reference thereto, are sufficiently stated in the opinion. There being no conflict in the evidence, the court charged the jury, at the plaintiff's written request, that if they believed the evidence they must find for him, to which charge the defendant excepted.

The rulings on the evidence and the charge given are here assigned as error.

OATES & COWAN, for appellant.—(No brief came to the hands of the reporter.)

B. F. CASSADY and J. M. CARMICHAEL, *contra*.—(1) The va-
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lidity of the proceedings in the Probate Court depended upon the act of February 12th, 1879 (Pamph. Acts, 1878-9, p. 3), then of force.—*Oliver v. Robinson*, 58 Ala. 46. The decree of sale is in exact conformity with the form prescribed by this act, and is therefore sufficient.—*Crimm v. Crawford*, 29 Ala. 623. (2) A judgment rendered by a court having jurisdiction can not be collaterally impeached.—2 Brick. Dig. p. 156, § 6. It is conclusive until reversed.—16 Ala. 271; 18 Ala. 668; 31 Ala. 234. By it both parties and privies are bound. 12 Ala. 482; 23 Ala. 395; 21 Ala. 560. And where the action of the court is dependent upon the ascertainment of a particular fact, its action is conclusive of the determination of that fact.—*Hamner v. Mason*, 24 Ala. 480. (3) The return by the collector of a list of the lands on which the taxes are unpaid, and the giving of notice required by the statute, give the court jurisdiction.—Pamph. Acts, 1878-9, pp. 3-5. If the tax-payer has any defense to the proceedings he must appear and make it; and if he fails to do so, the judgment ordering the lands sold is conclusive of such defense.—*Gunn v. Howell*, 27 Ala. 663; *Mervine v. Parker*, 18 Ala. 241; 2 Brick. Dig. p. 145, § 205. (4) The State had a preferred lien on the lands for the taxes assessed against them, and also for other taxes due by Hargrove. The tender made by him was, therefore, insufficient.—Code, 1876, § 375. (5) The description of the lands in the proceedings in the Probate Court, "two hundred acres of land, known as the lands of the late Israel Wiggins, deceased," was sufficient, because they could be thereby known or identified.—Code, 1876, Subd. 5, § 370.

SOMERVILLE, J.—The validity of tax sales must be governed by the law which is in force at the time of the sale. *Oliver v. Robinson*, 58 Ala. 46. The present sale took place in May, 1879, under a proceeding commenced before the probate judge of Dale county on the first of March of the same year. Its purpose was to enforce the collection of certain delinquent taxes due for the year 1878, and assessed against a certain tract of land, as the property of one Hargrove. The validity of the whole proceeding must therefore be tested by the act approved February 12, 1879, entitled "An Act to provide for the sale of land and other real estate for delinquent taxes, and the redemption thereof."—Acts 1878-79, pp. 1-8.

It is insisted that the judgment of the probate court condemning the lands to sale, bearing date April 14, 1879, fails to show that this court had proper jurisdiction of the subject-matter and of the party, and being a court of limited jurisdiction and of special statutory powers in this particular matter, the judgment of sale is void, because of this failure to recite

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the necessary jurisdictional facts. There can be no doubt of the correctness of this rule, or of its application to proceedings of this character. The facts necessary to confer jurisdiction on the probate court under the above act, in any proceeding to enforce the collection of delinquent taxes, must appear affirmatively in the record.—Burroughs on Tax., 281, 282; *Young v. Lorain*, 11 Ill. 637; *Gunn v. Howell*, 27 Ala. 663. The particular defect contended for is the alleged failure of the judgment to show that the land-owner had proper and legal notice of the pendency of the proceeding on which the judgment is based. Being a non-resident, he was entitled, under the express provisions of the act, to notice by publication in a newspaper, if one was published in the county.—Acts 1878-79, p. 5, § 4, *supra*. The docket of the tax collector, containing the delinquent list, which is required by the act to be delivered into the office of the probate judge by March first of each year, is shown to contain all the essential entries and recitals necessary to confer jurisdiction of the *subject-matter*, and was delivered to the proper officer within the requisite time. The contention is only as to *jurisdiction over the person* of the owner. The judgment recites that “notice has been given *as required by law*,” and it is insisted that this is the averment of a legal conclusion, and not of a *fact*, and that the fact of notice by publication in a newspaper should have been particularly stated. Whatever force there may have been in the suggestion under other circumstances, a full answer to it, in our opinion, is, that *the form of the judgment is prescribed by the statute itself*, and this form has been accurately followed in the present proceedings. If the law-making power see fit to declare, by legislative enactment, that such a recital of notice shall be sufficient, as they have done, we can not see upon what ground the enactment can be assailed, or pronounced invalid or unconstitutional by the courts.—*Davis v. State*, 68 Ala. 58. The forms of indictment and of civil pleadings, prescribed in our Code, are in many instances the averments of mere legal conclusions, and yet they have never been adjudged to be insufficient on this ground: The form of a judgment entry, prescribed by statute, would seem to rest upon a still more impregnable basis.—Burroughs on Tax. 285; *Morrill v. Swartz*, 39 Ill. 108; *Taylor v. People*, 2 Gilman, 349.

The probate court thus had jurisdiction of both the *subject-matter* and of *the person* of the land-owner, according to the recitals in the record of the particular cause, and such being the fact, the rule in ordinary cases is, that although the record may abound with reversible irregularities, fatal on appeal, it is *invulnerable to collateral attack*, as is here attempted.—2 Brick.

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Dig. 158, § 20; Burroughs on Tax. 285; *Thatcher v. Powell*, 6 Wheat. 119.

It is no objection to the application of this principle that the present is a proceeding to enforce the collection of delinquent *taxes*. While great accuracy is exacted in all such proceedings, and strict rules are applied for the protection of the tax-payer, this principle, forbidding the collateral assailment of judgments, has often been successfully invoked in actions of this nature. It has accordingly been decided that there is no sound reason why judicial proceedings for the enforcement of taxes should be exempted from its influence.—Burroughs on Tax. 285–6; Freeman on Judg., § 135; *Wellshear v. Kelley*, 69 Mo. 343; *Eitel v. Foote*, 39 Cal. 439.

The statute expressly provided that the judgment of condemnation should be rendered in such cases only where the tax-payer *interposed no defense*. It would certainly have constituted a full defense to the proceeding, if it had been shown on the trial that the tax-payer, or any one for him, had *tendered to the collector the full amount of the delinquent taxes* due by the owner; or that the owner had in his possession, in the county, a *sufficient amount of visible personal property*, out of which his unpaid taxes might have been realized by the tax collector.—Code, 1876, § 470. The act under consideration must have contemplated defenses of this nature, and the failure of the tax-payer to appear and interpose them on the trial, would be conclusive on him and his privies in estate holding title under him. In such cases, where the record *prima facie* shows jurisdiction, the judgment of the probate court can not be collaterally attacked on any ground which could have been pleaded in defense on the trial.—Freeman on Judg. § 135; *Cadmus v. Jackson*, 52 Penn. St. 295. The court, for this reason, properly excluded from the jury proof of the fact that Hargrove, the owner of the land, possessed a sufficient amount of personal property in the county, out of which the taxes of the delinquent could have been collected. The contrary averment was recited in the judgment of the court, and was sustained by the sworn return of the tax collector, made as required by the statute, thus placing this particular fact beyond the pale of collateral contradiction. So there was no error in refusing to let the defendant prove the tender to the tax collector of “the amount of taxes *due on the said land*,” exclusive of the owner’s poll-tax and his delinquent taxes due on personal property. This alleged tender was not only incompetent evidence for the reason above mentioned—that it constituted a mere *matter of defense* to the rendition of the judgment—but also very clearly for another reason. The State had a preferred lien on the property for the *entire unpaid taxes* of the delinquent, Har-

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grove, due for the year 1878, and the offer to pay should have included this entire amount, and should not have been limited to the tax on the land merely.—Code, 1876, § 375.

The alienation of the land by the owner, Hargrove, although made prior to the date of sale, could not affect the lien of the State for delinquent taxes. The sale to Oates, made in October, 1878, *was after this lien had accrued*, which, in point of time, is fixed by statute to be the first of January of the year for which the taxes were assessed.—Code, § 375. Such a lien overrides any title acquired by purchasers, whether with or without notice, and in however good faith it may have been made, and for whatever value. It follows the land in the hands of the vendee, all persons being chargeable with a knowledge of its existence. If any other rule were allowed to prevail, the State might be subjected to intolerable embarrassments in the prompt collection of its revenues, effected through the fraud and artifices of tax delinquents, making sales of their effects so as to evade the payment of their honest taxes.—Burroughs on Tax. 275–276; *Gledney v. Deavors*, 8 Ga. 479; *Kahl v. Love*, 37 N. J. (Law) 5; *Dunlap v. County of Gallatin*, 15 Ill. 7.

The land in controversy is described in the assessment list and other subsequent proceedings as “two hundred acres of land, *known as the lands of the late Israel Wiggins, deceased.*” It is objected that this description is void for uncertainty, and that for this reason no title was conferred on the purchaser at the tax sale. The object of all description is designation and identification. The usual rule, therefore, is, that the lands assessed must be described with such accuracy and certainty as to be capable of an easy identification.—Burroughs on Tax. 204–205. The statutory requirement is in substance the same, any description of a subdivision being sufficient by which it “may be known or identified.”—Code, §§ 362, 370.

We are of opinion that, under this rule, the description is sufficiently accurate. It presents the familiar case of a mere indefinite description, capable of being rendered certain, which is always open to more exact identification by the aid of parol evidence. From the earliest era of the common law, the grant of an estate, under the designation simply of “Black-acre,” was always considered sufficiently definite. In *Baucum v. George*, 65 Ala. 259, the premises conveyed by deed were considered by this court as described with sufficient accuracy under the name of “*The Douglas Gold Mine*, in Talladega county, Alabama.” In *Macklem v. Blake*, 19 Wisc. 397, the following description of land in a tax deed was sustained, viz: Certain described premises lying in “Washington city, now called Port Washington.” The name in the recorded plat was shown to be “Wisconsin city,” but parol evidence was admitted

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to show that the locality was familiarly known as "Washington city." In *Smith v. Messer*, 17 N. H. 420, a description in an advertisement for a tax sale was adjudged sufficient, which read as follows: "*A piece of land set off by E. C. on settlers' lot No. 5, 128 rods long and 38 rods wide—25 acres.*" Such descriptions are sustained on the strength of the maxim, *Id certum est quod certum reddi potest*—parol evidence being allowed in aid of identification, thus rendering that certain which might otherwise be ambiguous.—*Ellis v. Martin*, 60 Ala. 394; *Clements v. Pearce*, 63 Ala. 284; 2 Whart. Ev. §§ 942, 943; Burroughs on Tax. 207; *People v. Leet*, 23 Cal. 162; *People v. Crockett*, 33 Cal. 150.

We discover no error in the rulings of the court, and its judgment must be affirmed.

On a subsequent day of the term an application for a rehearing was filed, the grounds of which are sufficiently stated in the following response:

SOMERVILLE, J.—We are of opinion that the application for a rehearing in this cause should be granted. The original opinion is based upon the assumption that the lands were described throughout the entire tax proceedings, as two hundred acres of land, known as the lands of the late Israel Wiggins, deceased." The case was originally argued upon this theory.

A closer examination of the record discloses the fact that the lands were described in the assessment list, or "docket" filed with the probate judge, only as "*two hundred acres of land, lying in Dale county,*" the more perfect description having been added in the progress of the subsequent proceedings.

It is true that the assessment books themselves are not in evidence, but the act approved February 12, 1879, requires the tax collector to "enter into a substantially bound book, in the manner usual in docketing causes for trial in the circuit courts," each parcel of real estate, "*describing it* in the same manner it was *assessed*," with the amount of the unpaid taxes due. This book or docket the collector is required to deliver into the office of the probate judge by the first of March, and it is made the basis of all the subsequent proceedings. The notices to delinquents, the advertisements of sale, the certificates of purchase, and the tax deeds signed by the probate judge, all have antecedent reference to it.—Acts 1878–79, pp. 3 and 4, §§ 1 and 2.

Under the rules laid down in the opinion, and generally recognized by the authorities, the description given in the docket, or assessment list is clearly insufficient. It is impossible to locate these lands by a description so general and

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indefinite as "two hundred acres of land, lying in Dale county." It is void for uncertainty. Cooley on Tax. 286, note 4 and cases cited.

The probate court, therefore, had no jurisdiction of the subject-matter. The assessment, which is the foundation of the entire tax proceedings, being void, the proceedings themselves can not stand. This invalidity runs through and vitiates all these subsequent proceedings, including, of course, the tax sale itself.—Cooley on Tax. 258, 362; *Yenda v. Wheeler*, 9 Tex. 408. The sale was required to be according to the description given in the assessment list, or, what is the same thing, in the docket filed with the probate judge. No variance from this is permitted, the reason being, the authority or jurisdiction of the court to act in the premises depends upon the validity of this primary and fundamental proceeding.—Blackwell's Tax Titles, *281, 282; Burrough's on Tax. 281, 282.

The judgment is reversed and the cause remanded.

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Bill in Equity by Distributees to have Property held by the Widow at Decedent's Death declared her Statutory Separate Estate, and the Value thereof deducted from her Distributive Share.

1. *Widow's distributive share in husband's estate; statutory separate estate.*—The statute requiring that, in the computation of the widow's dower and distributive share in the deceased husband's estate, the value of her separate estate shall be deducted (Code, 1876, § 2715-16), refers to an estate created by the constitution and statutes, and not to an equitable estate, an estate which is made separate by the terms of its creation.

2. *Husband and wife; right of husband to renounce his marital rights in wife's statutory separate estate.*—The husband may renounce the trusteeship of the legal estate of the wife and all the privileges incident thereto, as he could have renounced all his marital rights at common law; and the effect of such renunciation is, that the property remains the property of the wife, she holding it as her equitable estate.

3. *Same; investment of moneys, the wife's statutory separate estate, by the husband.*—The husband, in investing money, the statutory separate estate of the wife, may elect, the claims of creditors who had previously supplied the family with necessaries not being involved, whether the investment shall be made in the name of the wife, continuing the character of the estate, or whether the investment shall be made in the name of himself, or of a stranger, as her trustee, to hold for her sole and separate use; and when such investment is made in the latter way, the value of the property thereby purchased, and held by her at the time of the husband's death, can not be computed in ascertaining her dower interest and distributive share in his estate.

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4. *Same; transfer of policy of life insurance by the husband to the wife; character of estate thereby created.*—A transfer by the husband to the wife of a policy of insurance on his life, payable to him, as a gift, creates in the wife an equitable separate estate; and, she having collected the insurance money after his death, the amount thereof can not be computed, in estimating her dower interest and distributive share in his estate. (This case distinguished from *Williams v. Williams*, 64 Ala. 405.)

APPEAL from Mobile Chancery Court.

Tried before Hon. JOHN A. FOSTER.

This was a bill by C. A. Harris and others, children and heirs at law of C. A. Harris, sr., who died on 17th February, 1880, against Jane E. Harris, the widow, and Leroy Brewer, as administrator of the estate of said decedent; was filed on 8th June, 1882; and the case made thereby is substantially as follows: On 9th May, 1872, said decedent, having in his hands, as husband and trustee, \$12,000, belonging to his wife, the said Jane E. Harris, as her statutory separate estate, invested the same in designated real estate in the city of Mobile, purchased from Dabney Berry, taking a deed therefor in his own name as trustee for his said wife, and "for her sole and only separate use, benefit and behoof forever, free from all the debts, claims or control of the husband whatsoever." The deed is made an exhibit to the bill. The bill charges that, although the words used in the deed "are such as to create an equitable estate in a married woman, yet such property is in fact part of her statutory estate, because the money invested in making the purchase was her statutory estate." The bill further avers "that at the time C. A. Harris married the respondent, Jane E. Harris, he held a policy of insurance upon his own life for his own benefit, in the *Ætna Life Insurance Company of Hartford, Conn.*, for the sum of five thousand dollars; and that after said marriage, to-wit: on the 26th day of June, 1871, the said C. A. Harris assigned said policy as follows: 'For value received I hereby transfer, assign and turn over unto my wife, Jane E. Harris and her children by me—and if I should survive her, it goes to her children by me, if any, and if none, reverts to my children by my former wife then living, equally; and if she survives me, then it is for her benefit absolutely—all my right, title and interest in policy of life insurance No. 83,029, issued by the *Ætna Life Insurance Company of Hartford, Connecticut*, and all benefit and advantage to be derived therefrom.' Orators aver that no value was given for such assignment other than love and affection; that the said C. A. Harris paid the premiums out of his own funds up to the time of his death; and that the defendant, Jane E. Harris, having survived him without children, received the proceeds of said policy." It is also averred that all the debts of said decedent had been paid; that

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his estate consists solely of personal property; that on 4th May, 1882, the administrator had filed his accounts and vouchers for a partial settlement, and asked for an order to make distribution among the distributees of said estate; and that the said widow claimed to be a distributee, and entitled to one-fifth of said estate, there being seven children; but that she was not entitled to participate in the distribution of said estate, because of the facts above stated. The bill prays that the administration of said estate may be removed into said Chancery Court; that the real estate held by the defendant, Jane E. Harris, under the deed from said Berry, and the money received on the said policy of life insurance may be decreed to be her statutory estate, and that she may be excluded from participating in the distribution of said estate, "except as to the excess of what her interest may be over the value of her statutory estate."

Mrs. Harris interposed a demurrer to the bill, which was sustained by the court. From the decree sustaining the demurrer this appeal was taken; and it is here assigned as error.

H. AUSTILL, for appellant.

JAMES BOND, *contra*.

BRICKELL, C. J.—The statute (Code of 1876, §§ 2715–16) excludes from dower and distributive share in the estate of the husband a widow, having at the death of her husband a separate estate of equal or greater value than such dower and distributive share; or, if it be of less value, requires that in the computation of the dower and distributive share, it shall be deducted. The separate estate to which the statute refers, is the estate created by the constitution and statutes, and not an equitable estate, an estate which is made separate by the terms of its creation.—*Smith v. Smith*, 30 Ala. 642; *Huckabee v. Andrews*, 34 Ala. 646.

It is not denied that the deed executed by Berry, conveying the house and lot to the intestate, Harris, as trustee for his wife, by its terms created an equitable separate estate—that it clearly and unequivocally excluded the marital rights of the husband, and limited the estate to the sole and separate use of the wife. The point of contention is, that as the money employed in the purchase, and forming the consideration of the conveyance, was of the legal or statutory separate estate of the wife, the house and lot of necessity, without regard to the terms of the conveyance, became likewise her legal or statutory estate, and its value must be computed in estimating her dower and distributive share in the estate of her deceased husband. The argument is,

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that the statutory estate of a married woman, without the intervention of a court of equity, can not be converted into an equitable separate estate. This question was the subject of patient and deliberate consideration in *Turner v. Kelly*, and *Masson v. Kelly*, 70 Ala. 85; and we affirmed that the husband could renounce the trusteeship of the legal estate of the wife and all the privileges incident to it, as he could have renounced all his marital rights at common law. The effect of such renunciation is precisely the same as was the effect of his renunciation of his common law rights; the property remains the property of the wife—it is her equitable separate estate. The statute or the constitution can not intervene, for their field of operation is to intercept the marital rights of the husband, and these do not attach, because the husband renounces them. The husband investing money, the statutory separate estate of the wife, as it was his duty to invest it, could elect whether the investment should be made in the name of the wife, continuing the character of the estate, or whether the investment should be made in the name of himself, or of a stranger, as a trustee, to hold for the sole and separate use of the wife. In making an investment of the latter kind, he alone is stripped of rights and privileges, the claims of creditors who had previously supplied the family with necessities not being involved. The conveyance creating an equitable separate estate in the wife, the value of the house and lot is not to be computed in ascertaining her dower and distributive share.

The transfer of the policy of insurance was a simple gift from the husband to the wife. At common law it was void, because of the unity of husband and wife and the incapacity of the wife to take and to hold chattels, or choses in action, or stocks, independently of the husband. In a court of equity, the gifts of chattels, or the transfers of choses in action, or of stocks, made by the husband to the wife were supported; and they were supported upon the presumption that they were intended for her separate use.—*McWilliams v. Ramsay*, 23 Ala. 813; *Williams v. Maull*, 20 Ala. 721; *McMillan v. Peacock*, 57 Ala. 127. As the transfer of itself created in the wife a separate estate, an estate not made her separate estate by the constitution or the statute, it is an equitable estate, and the statute does not require that it should be taken into the computation in estimating her dower and distributive share. This case is clearly distinguishable from *Williams v. Williams*, 68 Ala. 405, in which the policy was taken out in the name of the wife as sole beneficiary, right and title vesting in her by the policy itself, and not by a transfer or gift from the husband.

We find no error in the decree of the chancellor, and it must be affirmed.

McCrary v. Chase & Co.

Contest of Claim of Exemption.

1. *Exemption ; right of, dependent on residence in the State.*—The constitution and statutes of this State render residence within the State an essential element of the right to an exemption of a homestead, or of personal property from liability for the payment of debts ; and the right, springing from, and being dependent upon the *status* of residence within this State, it may be admitted, terminates whenever the *status* is changed by the acquisition of a residence in another State.

2. *Same ; right of, must be determined at the time lien of process attaches.*—But the right to such exemption must be determined according to the state of facts existing when the lien of an execution or other process attaches.

3. *Same ; contestation of, a suit ; by what facts supported.*—The contestation of a claim of exemptions is essentially a suit, in which the plaintiff causing the levy is the actor, and the levy is the institution of the suit. The causes of contest assigned must be supported by facts existing at the time the contest is instituted ; and the subsequent occurrence of facts essential to the plaintiff's right of recovery, operating to defeat or divest the right of exemption, will not support the contest.

4. *Same.*—Hence, where personal property levied on under an execution was claimed as exempt by the defendant in execution, and the claim was contested, and at the time of the levy and of making the claim the defendant was a resident of this State, his subsequent removal from the State, and residence in another State at the time of the trial of the contest can not deprive him of his right to an exemption of the property levied on from the payment of the execution.

APPEAL from Barbour Circuit Court.

Tried before Hon. H. D. CLAYTON.

The facts are sufficiently stated in the opinion.

G. L. COMER, for appellant. (No brief came to the hands of the reporter.)

S. H. DENT and JOHN D. ROQUEMORE, *contra*, cited Story on Con. Laws, § 47 ; *State v. Hallett*, 8 Ala. 159 ; *Glover v. Glover*, 18 Ala. 367 ; *Talmdge v. Talmdge*, 66 Ala. 199 ; *Allen v. Manasse*, 4 Ala. 554 ; Thomp. on Homs. & Ex. § 91, and authorities cited ; *Daniel v. Hamilton*, 52 Ala. 105.

BRICKELL, C. J.—The appellees, having obtained before a justice of the peace a judgment against the appellant, caused an execution issuing thereon to be levied on ten shares of the capital stock of a corporation created under the laws of this

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State, located in the city of Eufaula, and known as the "City Building and Loan Association." The appellant claimed the stock as exempt from levy and sale under execution, and pursuant to the statute made and filed an inventory of his personal property and the value thereof. The claim was contested by the appellees upon the ground that it was excessive, specific property mentioned being of greater value than was expressed in the inventory; and it being averred that the appellant had in money four hundred dollars not embraced in the inventory. A trial of the contest was had before the justice of the peace, and resulted in a judgment sustaining the claim of exemption, from which judgment the appellees appealed to the Circuit Court. Upon the trial in the Circuit Court, it appeared that at the time of the issue and levy of the execution, and when the claim of exemption was interposed, the appellant was a resident citizen of this State, but soon thereafter removed with his family to the State of Georgia, and there engaged in the mercantile business. Some months before the trial in the Circuit Court, in consequence of sickness, he brought his family into this State and boarded them at a hotel in the city of Eufaula, visiting them from time to time. The appellant testified that he intended removing back to this State, so soon as he completed certain business negotiations then in progress, and which were complete except the payment of a sum of money.

The Circuit Court charged the jury, that although the appellant was a resident citizen of this State at the time of filing his claim of exemption, and at the time of the trial before the justice of the peace, yet, if he was not then a resident citizen of the State, he was not entitled to the exemption, and they must find for the appellees; and refused four several instructions requested by the appellant. In the view we take of the case, it is unnecessary to notice the instructions refused.

The constitution and the statutes render residence within the State an essential element of the right to an exemption of a homestead, or of personal property from liability for the payment of debts. The words employed in designation of the person entitled to the right are, *any resident of this State*. The pre-existing statutes had limited exemptions to the heads of families, and the exemption was intended for the use of the family in the State. These were the words of the statute, but it was said that without the words it could not have been supposed that there was a purpose to legislate for the benefit of those who were without the territorial limits, and not subject to the jurisdiction of the State.—*Allen v. Manasse*, 4 Ala. 554; *Sallee v. Waters*, 17 Ala. 488; *Boykin v. Edwards*, 21 Ala. 261. The same policy pervades the constitution and the statutes now, affording benefit and protection to the unfortunate

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debtors within the territorial limits of the State, and subject to its jurisdiction. Whether it is intended that the *domicil* of the person claiming the exemption must be within the State, is not now a question we propose to consider. The place of abode must be here—there must not be a mere temporary sojourn. *Talmadge v. Talmadge*, 66 Ala. 199. The fact is uncontroverted, that when the execution was issued and levied, and when the claim of exemption was interposed, the residence and domicil of the appellant were within this State, and he was of right entitled to the statutory and constitutional exemption. The right springing from, and being dependent upon the *status* of residence within this State, it may be admitted, terminates whenever the *status* is changed by the acquisition of residence in another State.—*Finley v. Sly*, 44 Ind. 269. The right to an exemption must be determined according to the state of facts existing when the lien of an execution or other process attaches. If the right does not then exist, the occurrence of subsequent facts will not operate a divestiture of the lien. If, when the execution in this case was levied, the residence of the appellant had been in another State, his subsequent removal and acquisition of a residence in this State could not have operated to divest the lien attaching from the levy. The contestation of a claim of exemptions is essentially a suit, in which the plaintiff causing the levy is the actor. The institution of the suit is the levy. *McAdams v. Beard*, 34 Ala. 478. The plaintiff must assign the causes of contest, and must support them by facts existing at the time the contest is instituted. The subsequent occurrence of facts essential to his right of recovery, operating to defeat or divest the right of exemption, will not support the contest. The rule is general, if not universal, that facts not occurring until after the institution of suit, essential to a recovery, will not support the suit.—*Hill v. Hill*, 10 Ala. 527; *Donaldson v. Waters*, 30 Ala. 175. The grounds of contest must be verified by affidavit, and verified as existing at the time of the claim of exemption. There was in this case no denial of the residence of the appellant in this State at the time the claim of exemption was made. The contest was directed entirely to the inquiry and fact, whether the claim was excessive. That ground could not be abandoned, and another substituted, dependent upon a state of facts arising subsequently. The institution of the contest had deprived the appellant, while he was a resident of the State, of the use and enjoyment of the property upon which the levy was made; of the opportunity of employing it to aid in his acquisition of a residence elsewhere. The purpose of the constitution and statutes conferring the exemption is, to leave the resident of the State in the free and unrestrained use and enjoyment of the property. And it is

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not the right of a creditor, through the instrumentality of a contest, to deprive him of the use of it in the acquisition of a residence elsewhere; and when the residence is acquired, to invoke its existence to support a suit he has wrongfully instituted.

The charge given by the Circuit Court is erroneous, and compels a reversal of the judgment.

Reversed and remanded.

The State of Alabama for the use of Montgomery County v. Allen.

Contest of Claim of Exemption.

1. *Homestead exemption; may be claimed by surety in confessed judgment for fine and costs on conviction for a misdemeanor.*—A surety in a judgment confessed under the statute for the fine and costs in a prosecution for a misdemeanor, is entitled to a homestead exemption as against an execution issued on such judgment.

2. *Confession of judgment for fine and costs in case of misdemeanor; a civil liability.*—A confession of judgment by sureties for a defendant in a prosecution for a misdemeanor is a civil proceeding in the name of the State for the use of the county in which the crime was committed and prosecuted, and imports a civil liability—a mere promise to pay money, evidenced by the judgment thus confessed.

3. *Exemption of State from operation of general statute.*—Exemption from the operation of general statutes is a State prerogative, and does not extend to counties.

APPEAL from City Court of Montgomery.

Tried before Hon. THOMAS M. ARRINGTON.

The facts are sufficiently stated in the opinion.

H. C. TOMPKINS, for appellant.—(1) The judgment upon which the execution was issued was confessed under § 4454 of Code of 1876. It is founded upon the fine and costs assessed against the defendant; and the effect of the action taken by the sureties is, that they simply come in and make themselves parties defendant to the proceedings against the principal for the recovery of the fine and costs. Such a judgment is not, strictly speaking, a contract; it is rather a proceeding of the court used for the purpose of enforcing the payment of a judgment rendered in a criminal case. It is, in no sense, a civil proceeding, but is criminal in its nature. See *Com. v. Cobbett*, 2 Yates, 352; *Com. v. Com'rs*, 8 Serg. & R. 151. (2) Upon that theory

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it has been held in Pennsylvania by *nisi prius* courts of high standing that no exemption could be claimed against a judgment obtained upon a forfeited recognizance. The direct question has not been before the Supreme Court of that State, though, from the principles announced in the cases cited *supra*, that court would undoubtedly sustain that view.—*Com. v. Dougherty*, 8 Phil. R. 366; *Com. v. Whiteside*, 1 L. Bar, Sept. 25, 1869. There are decisions which hold that an exemption may be claimed against such judgment, but they rest on the ground that a party is entitled to exemptions, even against a judgment for fine and costs, which is not the law in this State. The rule in this State is, that the right of exemptions depends, not upon the judgment, but upon the original cause of action. (3) This was a judgment in favor of the State. Upon this point the decisions may be conflicting, but an adherence to long established rules forces that conclusion. (4) The State is not included in any statute, unless expressly named therein.—*Lott v. Brewer*, 64 Ala. 287; *U. S. v. Hewes*, Crabbe, 307; *U. S. v. Hoar*, 2 Mas. 311; 4 Cow. 143; 1 Watts, 54; 8 Bush, 220; 54 Ga. 36; 29 Gratt. 683; *Ib.* 716.

JNO. GINDRAT WINTER, *contra*.—(1) The judgment was founded on a contract—it is true, for the payment of a fine; but the surety was, in no sense, thereby connected with the crime. This case is analogous to the case of a surety on a promissory note given by the principal, in compromise of a claim for damages, growing out of a tort. See 51 Mo. 133. (2) The judgment is not in favor of the State; it is for the use of Montgomery county; and hence, the county and not the State is the party really interested.—Code of 1876, §§ 4458, 2891. (3) It is true, as a general proposition, that general words in a statute, declaring or affecting rights or interests, do not include the State; but it has been repeatedly held that exemption laws are not within this rule.—*Hearn v. State*, 62 Ala. 218; *State v. Williford*, 36 Ark. 155; *Com. v. Lay*, 12 Bush (Ky.), 286.

STONE, J.—Robert Coles was convicted of carrying a deadly weapon concealed about his person, and a fine of fifty dollars was assessed against him. Thereupon he, together with John Allen and another as sureties, confessed judgment for the amount of the fine, and the costs of the prosecution, under § 4454 of the Code of 1876. An execution, issued on said confessed judgment, was levied by the sheriff on the homestead of said John Allen, and a claim of exemption was interposed under the statute. The homestead was and is in value much less than two thousand dollars, and in extent much less than one hundred and sixty acres. The property was adjudged not to be

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subject to levy and sale under the execution, and that is the sole question for our consideration.

It is contended for appellant that the exemption claimed does not apply to such a case as this; that the statute only exempts such property from levy and sale under process for the collection of debts contracted, and that this is not the case of a debt contracted.—Code, § 2820. In *Bowden v. Williams*, 69 Ala. 433, we held that the statute did not exempt property from liability for torts or penalties. The argument here is, that the sum sought to be collected is a fine for a misdemeanor, and the confessed judgment and execution thereon are only methods of collecting that fine. This may be true of the liability of the principal in the confessed judgment. With the sureties it is different. There is no public offense, tort, or wrong imputed to them. In becoming Coles' sureties, they in no sense became participants in the public wrong of which he was convicted. This was a civil liability—a mere promise to pay money, evidenced by the judgment they confessed. It was a civil proceeding, with all the attributes of a civil proceeding. If it were not so, the State could not prosecute this appeal. *Hearn v. The State*, 62 Ala. 218; *Hatch v. The State*, 40 Ala. 718; 2 Brick Dig. 419; *State v. Pitts*, 51 Mo. 133; *Thomp. on Homestead*, 386. There is nothing in this objection.

It is objected in the next place, that this is a claim by the State, and inasmuch as the statute does not expressly declare any exemptions against obligations to the State, none can be granted. We need not decide this question. The proceeding, although in the name of the State, is for Montgomery county. The fine money does not go to the State, but to the county. In fact, these proceedings are prosecuted in the name of the State of Alabama for the use of Montgomery county. Exemption from the operation of general statutes is a State prerogative. It does not extend to the counties.—Code of 1876, § 4458; *Miller v. The State*, 38 Ala. 600; *State v. Connor*, 69 Ala. 212.

Affirmed.

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Action against Railroad Company for Damages to Stock.

1. *Injury to stock by railroad company; allowing stock to run at large not contributory negligence.*—Apart from the influence of any special

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statute, the law in this State is, that it is not such contributory negligence for the owner of stock to suffer them to run at large, as to prevent him from recovering damages for injuries negligently done to them by persons or corporations owning or controlling railroads.

2. *Same; rule as to contributory negligence not changed by local act of February 28, 1881 (Pamph. Acts, 1881-1, p. 223).*—This rule as to contributory negligence in such cases is not changed by the act of February 28th, 1881 (Pamph. Acts, 1880-1, p. 223), making it unlawful for stock to run at large in a designated territory, subjecting the owner to damages committed by such stock to the lands, crops, etc., and declaring the owner or manager of stock who knowingly suffers them to run at large guilty of a misdemeanor.

3. *Same; owner of stock allowing them to run at large in violation of local statute, not debarred of right of recovery.*—The fact that the owner of stock, in allowing them to run at large, is guilty of a violation of a local statute, making it unlawful for stock to run at large within a designated territory, does not preclude him from recovering damages against a railroad company for injuries done to the stock within such territory, while at large, by defendant's train. In such case the plaintiff's unlawful act did not contribute to the injury, and he does not require any aid from it to establish his cause of action.

4. *Railroad corporations; degree of diligence required.*—The law exacts of railroad companies, and other common carriers, in their use of steam-power, extraordinary diligence, or "that degree or diligence which very careful and prudent men take of their own affairs"; and while there are authorities which confine this rule of diligence to the transportation of passengers, such is not the law in this State.

5. *Same; blowing whistle or ringing bell before reaching station or public road.*—Under the statute (Code of 1876, § 1699,) no duty is imposed on the engineer in charge of a locomotive running on a railroad to blow the whistle or ring the bell until the locomotive comes within one-fourth of a mile of a road-crossing or regular depot or stopping place; and hence, a charge, given at the request of a plaintiff in an action against a railroad company for damages to stock, which assumes the existence of such duty at a time when the statute does not require its observance, is erroneous.

APPEAL from Greene Circuit Court.

Tried before Hon. SAMUEL H. SPOTT.

This was an action by J. A. McAlpine & Co. against the Alabama Great Southern Railroad Company, a corporation operating a railroad in this State, to recover damages for injuries alleged to have been done to a mare and mule, the property of the plaintiffs, by the defendant's locomotive and train of cars, through and by reason of negligence and want of care of defendant's agents in the management and running of said locomotive and train. The facts bearing upon the principal question decided are sufficiently stated in the opinion. The evidence introduced on the trial showed that the mare was fatally injured, and the mule killed at different times, and at different places on defendant's track, by being run against and thrown from the track by locomotives attached to defendant's regular passenger trains. The evidence tended to show that the mule was killed by a locomotive attached to a train going north-east, about three hundred and eighty-four yards south-

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west of Boligee, a regular depot or station on defendant's road, at which station or depot a public road crossed defendant's track; that "the signal post at or near which the whistle for the station and crossing is usually blown," was about four hundred and ten yards further south-west, thus making "the signal post" about seven hundred and ninety-four yards from said station and crossing, and that "the engineer, at the usual place for giving the signal for the station, blew one blast for the station, and also, in connection therewith, three blasts for the public road crossing."

The second charge given at the request of the plaintiff, referred to in the opinion, is in these words: "If the jury believe from the evidence that the injury to the mule occurred about 384 yards south of the regular depot or stopping place at Boligee and the public road crossing at that place, and that the engine or train which committed the injury was going north, and that the whistle was not blown or bell rung for 200 yards or more before the engine or train struck the mule, then such failure to blow the whistle, or ring the bell within the space of 200 yards or more south of where the mule was killed, was, of itself, negligence, and authorizes the jury to find for the plaintiffs so far as the mule is concerned." To the giving of this charge the defendant excepted.

The defendant also reserved an exception to the refusal of the court to give the following charge at its written request: "If the jury believe from the evidence that the defendant was in the possession of the right of way where said mare and mule were killed or injured, and was running its train on its right of way, and that said stock were on defendant's track, and defendant used ordinary care and diligence to prevent the damage complained of, then the plaintiffs can not recover; and if the evidence satisfies the jury that the speed of the train was checked while approaching the animals, the mere fact that the train was not stopped does not tend to show a want of care and prudence." The trial resulted in a verdict and judgment for the plaintiffs, from which the defendant appealed. The charge given and the charge refused, and the rulings on the evidence indicated in the opinion are among the errors here assigned.

T. C. CLARKE, J. P. McQUEEN and WOOD & WOOD, for appellant. (No brief came to the hands of the reporter.)

HEAD & BUTLER, with whom was H. M. JUDGE, *contra*.
(1) It is a well settled rule of law that negligence or unlawful conduct of the plaintiff does not excuse the defendant's negligence, unless it was the *immediate, proximate* cause of the injury.—*Foster v. Holly*, 38 Ala. 76, and authorities there

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cited; *Marble v. Ross*, 124 Mass. 44; *O'Brien v. McGlinchey*, 68 Me. 552; *C. & St. L. R. R. Co. v. Woolsey*, 85 Ill. 370; *C. & St. L. R. R. Co. v. Murray*, 82 Ill. 76; *Blanc v. Chesapeake R. R. Co.*, 9 W. Va. 252; *Baylor v. B. & O. R. R. Co.*, 9 W. Va. 270; *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621. An examination of the New York, Pennsylvania, Kansas and Kentucky cases, which appear to be opposed to the appellees' position in this case, will show that they ignore the principle that the plaintiff's negligence must be the proximate cause of the injury.—See *Clark v. R. R. Co.*, 11 Barb. 112; *R. R. Co. v. Rehman*, 49 Pa. St. 101; 14 B. Mon. 75. (2) It is contended that, because it is unlawful for stock to run at large, the violation of this law, in every case of injury to stock, is the proximate cause of the injury, and excuses the negligence of the party committing the injury. This question was before this court in *Jones v. Alabama Great So. R. R. Co.*, at December term, 1880 [not reported], under the act found in Pamph. Acts, 1871–2, p. 379. Under that act it was unlawful for stock to run at large, yet this court held that the act had no reference to the liability of railroad companies for negligence. (3) Our statutory system was intended to guard stringently the interests of property holders along the lines of railroads, and to protect their property from injury by railroads.—Code, 1876, §§ 1700, 1712. The special act in question was manifestly designed for the particular benefit and convenience of agriculturists, not mentioning railroads. It was not intended that this act should engraft an exception upon the general law as to the liability of railroad companies for injuries to stock. (4) The charge given was in accordance with the statute. Code, 1876, §§ 1699, 1700; *M. & C. R. R. Co. v. Williams*, 53 Ala., p. 599.

SOMERVILLE, J.—This action is one for damages, for the alleged negligent injuring of certain stock by the servants of the defendant railroad company. The stock—a mule and a horse—were running at large within that portion of Greene county which is included in the provisions of the act of February 28, 1881, entitled “An Act to prevent the running at large of stock in certain portions of Greene county.” This act declares it “*unlawful* for stock of any kind or description whatever to run at large” within a designated part of the county, and makes the owner liable to the party injured for any damages committed by said stock to any lands, crops, fruit trees, shrubbery, or other property” within the specified district. The owner, or manager of any stock, who knowingly suffers it to run at large, is, furthermore, declared guilty of a *misdeemeanor*.

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The principal question for decision is, whether a plaintiff, who suffers his stock to run at large within the prohibition of this act, is debarred from recovering damages for its negligent injury.

Apart from the influence of this special act, the law is unquestioned, that it is not such *contributory negligence*, in this State; for the owner of stock to suffer it to run at large, as to prevent him from recovering for any damage negligently done to it by persons or corporations, owning or controlling railroads. Section 1712 of the present Code (1876) expressly declares that, in such cases, "permitting live stock or cattle of any kind to run at large shall not be considered as *contributing* to such killing or injury." This would no doubt be the law without the statute, upon the ground that the negligence of the owner in such cases is rather the *remote* than the *proximate* cause of the injury, and can not, therefore, be regarded as contributory negligence.—*South & North R. R. Co. v. Williams*, 65 Ala. 74; *Gothard v. The Ala. G. S. R. R. Co.*, 67 Ala. 114.

Does the special act above cited operate to change this principle? This question, in our opinion, is settled in the negative by the case of *Jones v. The Ala. G. S. R. R. Co.*, decided at the December term, 1880 [not reported], in which we construed a similar act, approved February 14, 1872 (Acts 1871-72, p. 379), holding that it was "confined to the protection of growing crops, and had no reference to the liability of railroad companies." We see no reason for departing from the doctrine of this decision, believing, as we do, that the cases to which we are cited by appellant's counsel, in support of the opposite view, are unsound in their reasoning, as well as repugnant to the rule of contributory negligence declared in such cases by our statute.

It is insisted that the plaintiff was guilty of an *unlawful act* in suffering his stock to run at large, and that this debars his right of recovery. The rule, however, is, that "to deprive a party of redress because of his own illegal conduct, the *illegality* must have *contributed to the injury*."—Cooley on Torts, 155. The fact of illegality here renders the act of permitting the stock to run at large neither more nor less *contributory* to the injury, or *proximate* as a cause of it.—Wharton on Neg. §§ 995, 331. The relation of the act to the injury complained of would be precisely the same, whether it was legal or illegal. It would have no more tendency to produce the injury in the one case than in the other. This is the better and sounder rule recognized in the case of injuries or accidents happening in the violation of Sunday laws.—Sherman on Neg., § 39; Whart. on Neg., § 331; *Platz v. City of Cohoes*, 42 Amer. Rep. 286. "The same natural causes," as observed by a learned court,

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"would have produced the same results on any other day, and the time of the accident or injury, as that it was on Sunday, is wholly immaterial so far as the cause of it, or the question of contributory negligence is concerned."—*Sutton v. Wauwatosa*, 29 Wis. 21; *Mohney v. Cook*, 26 Penn. St. 342; *Woodman v. Hubbard*, 25 N. H. 67; *Philadelphia, &c., R. R. Co. v. Towboat Co.*, 23 How. (U. S.) 209. "The fact that a party injured," says Mr. Cooley in his works on Torts, "was at the time violating the law, does not put him out of the protection of the law; he is never put by the law at the mercy of others." Cooley on Torts, 157.

The precise question under consideration has been decided, in accordance with the foregoing views, several times by the Supreme Court of Illinois.—*C. & St. L. Railroad Co. v. Woosley*, 85 Ill. 370; *Ewing v. C. & A. R. Railroad Co.*, 72 Ill. 25, and cases cited.

It is clear that, in all such cases, the plaintiff requires no *aid* from the illegal part of the transaction in order to establish his cause of action, and this is the test of recovery, both in actions *ex delicto* and *ex contractu*.—*Holt v. Green*, 73 Penn. St. 198; *S. C.* 13 Amer. Rep. 737. He is debarred from recovery only when he can not prove his cause without being "obliged to lay the foundation of his action in his own violation of the law."—*Way v. Foster*, 1 Allen, 408; *Gunter v. Leckey*, 30 Ala. 591.

Under these views there was no error in the action of the court excluding the act of February 28, 1881, under consideration, from being given in evidence to the jury, or in the rulings of the court touching its relevancy to the case.

The rule has been frequently declared by this court, in accordance with the generally recognized doctrine, that the law exacts of railroad companies, and other common carriers, in their use of steam power, extraordinary diligence, or "that degree of diligence which very careful and prudent men take of their own affairs."—*M. & M. Railway Co. v. Blakely*, 59 Ala. 471; *Cook v. C. R. R. Co.*, 67 Ala. 533; *Tanner v. L. & N. R. Co.*, 60 Ala. 621; *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387. There was no error in refusing the charge, requested by the defendant, exculpating the company from liability on the condition of having used only *ordinary* care and diligence. There are authorities which confine this rule of diligence to the transportation of *passengers*, but such is not the law in this State.

The court erred, however, in giving charge numbered *two* requested by the plaintiff. The statute (Code, § 1699,) requires the engineer, in control of a locomotive, "to blow the whistle or ring the bell, at least *one-fourth of a mile* before reaching

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any public road crossing, or any regular depot or stopping place, and to "continue to blow such whistle or ring such bell, at intervals," until he passes such road crossing, or reaches such depot or stopping place.—Code, 1876, § 1699. It is plain that no *duty* is imposed on the engineer to blow the whistle or ring the bell at all, until the locomotive comes within one-fourth of a mile, which we judicially know to be four hundred and forty yards, of the road-crossing or the depot, as the case may be. Any conformity to the statutory requirement, prior to this time, is entirely optional, and not peremptory. The vice of the charge in question is, that it assumes the existence of the duty at a time when the statute does not require its observance.

The judgment of the Circuit Court must be reversed and the cause remanded.

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Assumpsit for Money had and received for Plaintiff's Use.

1. *Money ; title to, passes by delivery.*—Money and bank-notes current as money pass from hand to hand by delivery, possession of itself being sufficient evidence of title, upon the faith of which all persons dealing fairly may safely receive them.

2. *When money, the proceeds of the sale of mortgaged chattels, can not be recovered by transferee of mortgage against party receiving it from mortgagee.*—R. having executed a mortgage to M. & T. upon a crop to be grown by him on a designated place, to secure advances obtained by him from them, M. & T., after having the mortgage duly recorded, transferred and assigned it to R. & W. After the assignment, and without notice thereof, R. delivered two bales of the crop conveyed by the mortgage to M. & T., and M. shipped it in his own name to warehousemen in the city of Montgomery for sale. The cotton having been sold, M. purchased of J. & Bro., merchants in said city, a bill of goods, giving them in payment an order on the warehousemen for \$134.73, expressing that it was the proceeds of three bales of cotton. This order was paid, on presentation, to J. & Bro., \$98.20 thereof being proceeds of the sale of the two bales of cotton which R. had delivered to M. & T.; J. & Bro. having at the time no notice that the cotton did not belong to M., or of the manner in which he obtained it, or of the assignment of the mortgage. *Held*, in an action of *assumpsit* brought by R. & W. against J. & Bro. to recover the proceeds of the sale of the two bales of cotton paid to them by the warehousemen, that the defendants had the right to presume that the money paid to them belonged to M., and, having received it without knowledge, in good faith, and upon a valuable consideration, they were entitled to retain it; and that the plaintiffs could not recover.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

The facts are sufficiently stated in the opinion.

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E. P. MORRISSETT, for appellant.—(1) While a mortgage on an unplanted crop is a mere executory contract, the cotton having been delivered in part execution thereof, the mortgagees were thereby clothed with the legal title.—*Stern v. Simpson*, 62 Ala. 194; *Abraham v. Carter*, 53 Ala. 8. (2) By the assignment of the mortgage the appellants were vested with the mortgagees' right, title and interest in the crops covered thereby. *Buell v. Underwood*, 65 Ala. 285; Jones on Chat. Mort. § 505. (3) The delivery of the cotton to the mortgagees was, in legal effect, a delivery to the transferees, and the legal title thus perfected passed to them.—61 Ala. 114; Benj. on Sales, (3d Am. Ed.) §§ 81, 83. (4) The mortgagees being estopped from claiming the cotton by their transfer, are not the appellees, who claim under them, also estopped?—19 Ala. 430; 21 Ala. 91. They could only take such title as Matthews had at the time he gave the order; and he then having no title, they acquired none. *Lyde v. Taylor*, 17 Ala. 274. (4) The appellees were not *bona fide* purchasers. There can not be a *bona fide* purchase of property from one, when the *legal title* to such property is outstanding in another.—17 Ala. 274; Benj. on Sales (3 Am. Ed.), § 6; 11 Wendell, 80; *The Idaho*, 3 Otto, 575; Story on Sales, § 201. (6) "The appellants are *bona fide* purchasers, and the legal title being in *them*, how can *they* be deprived of *their* property by the wrongful conduct of Matthews, or by any one else, except by due course of law?"—Dec. of Rights, § 7; *Sumner v. Woods*, 67 Ala. 139; *Wilburn v. McCalley*, 63 Ala. 436; *Blackman v. L. D. & Co.*, 63 Ala. 549; 58 Ala. 176; 67 Ala. 109. (7) The order was not negotiable paper, because it was limited to payment out of a particular fund.—Dan. on Neg. In. § 50; 43 N. H. 129, and authorities there cited; Chitty on Bills, p. 158; *Jenny v. Herle*, Lord Raym. 1361.

SAYRE & GRAVES, *contra*.—(1) The note secured by the mortgage was not negotiable, and the mortgagor, without notice of the transfer, had a right to pay to the mortgagees, although the mortgagees did not have possession of the mortgage.—*Hart v. Freeman*, 42 Ala. 567. Payment to the mortgagees under such circumstances operated an extinguishment of the mortgage; and after such payment it was no security in the hands of the transferee.—Jones on Chat. Mort. § 646. (2) After delivering to the mortgagees in satisfaction of the debt, the mortgagees could give a good title to an innocent purchaser; and the mortgagees could buy property or pay debts therewith, if dealing with an innocent party.—Jones on Chat. Mort. § 464. (3) Parties are not held responsible as trustees, unless knowledge is carried home to them of the trust, and that they are receiving trust funds. (4) The recorded mortgage gave notice that the

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mortgagor could not dispose of the mortgaged property; but it also gave notice that the mortgagees could. (5) Free trade in money is the law of trade. When it ceases to pass freely, from hand to hand, except to those having notice of a superior right, when it is required to trace the title to money used in trade, the wheels of commerce will stop, and the daily avocations of life will cease. As soon, therefore, as the money, the proceeds of the cotton, passed into the hands of the appellees, who were innocent parties, it became absolved from all demands against it.

BRICKELL, C. J.—The facts of this case, as shown by the bill of exceptions, are, that on the 8th day of February, 1880, Charles H. Robinson, to obtain advances to enable him to make a crop, executed a mortgage to Matthews & Tobias upon his entire crop to be grown that year on a plantation known as the “Merriwether place,” to secure the payment of his promissory note for two hundred dollars, which is embodied in the mortgage. On the 3d day of March, 1880, the mortgage was recorded in the proper office; and on the 17th of June, 1880, by writing thereon endorsed, Matthews & Tobias transferred it to the appellants, Rice & Wilson. In October, 1880, Robinson, not having notice of the assignment, in part payment of the mortgage debt, delivered to Matthews & Tobias two bales of the cotton grown by him, and Matthews shipped it in his own name to Marks & Fitzpatrick, warehousemen in the city of Montgomery, for sale. The cotton having been sold, on the 22d day of October, 1880, Matthews purchased of the appellees, Jones & Brother, merchants in the city of Montgomery, a bill of goods, giving them in payment an order on S. C. Marks, of the firm of Marks & Fitzpatrick, for one hundred and thirty-four dollars and seventy-three cents, expressing that it was proceeds of three bales of cotton. This order on presentation was paid to the appellees; ninety-eight dollars and twenty cents being proceeds of the sale of two bales of cotton, which Robinson had delivered to Matthews & Tobias. The appellees had no notice that the cotton did not belong to Matthews, nor of the manner in which he obtained it, nor of the assignment to the appellants of the mortgage of Robinson. The present action is brought by the appellants to recover of the appellees the proceeds of the sale of the two bales of cotton, paid to them by Marks & Fitzpatrick. The Circuit Court refused to instruct the jury, on request of the appellants, in substance and effect, that upon this state of facts they were entitled to recover; but, on the request of the appellees, instructed them, that if they believed the evidence, they must find for the appellees. These rulings form the matter of the assignment of errors.

Conceding to the appellants the proposition upon which they

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insist, that the legal title to the cotton enured to them upon its delivery to Matthews & Tobias, and that for its subsequent conversion they could maintain trover against them, or waiving the tort, *assumpsit* for money had and received, recovering the price for which they sold the cotton, does not meet the question now involved. Upon the strength of the legal title, if it enured to them as claimed, there could be a recovery of the cotton, or, from a tortfeasor, of the proceeds of its sale, if he sold for money or its equivalent. The legal title can not, however, enable the appellants to pursue money, the proceeds of the sale of the cotton, which was in the usual course of business passed into the hands of an innocent holder, upon a valuable consideration.—*Burnett v. Gustafs*, 54 Iowa, 86; Jones on Chat. Mort. § 464. Money, or bank-notes current as money, pass from hand to hand by delivery, possession of itself being sufficient evidence of title, upon the faith of which all persons dealing fairly may safely receive them. In the leading case of *Miller v. Race*, 1 Burr. 452 (1 Smith Lead. Cases (7 Am. Ed.), 808), the principle was settled by Lord Mansfield. A bank-note had been stolen from the mail, and was taken for value by the plaintiff in the usual course of business. Upon its presentment to the bank for payment, it was taken and retained by the defendant, as clerk in the bank, having notice of the robbery, and the bank having been indemnified by the real owner to stop the payment of the note. The plaintiff was held entitled to recover, because money or bank-notes pass upon the faith of possession, and that it is necessary for the purposes of commerce, that their currency should be established and secured. Any other principle would embarrass and render insecure the daily transaction of business. If the defendants had known of the claim of plaintiffs to the cotton, and that the money they were receiving was the proceeds of its sale, a different question would be presented. But not having such knowledge, they had the right to presume the money paid to them was the money of Matthews, the drawer of the check, and having received it in good faith, upon a valuable consideration, they are entitled to retain it.

Affirmed.

[Thornton v. Williams.]

Thornton v. Williams.*Trover.*

1. *Statute of frauds; when parol agreement not within.*—W. & B. made a written contract for the cultivation of a piece of land, by which W. was to furnish the land and team, and B. the labor, the crop to be divided between them. Afterwards B. became indebted to T. for advances, for which he executed his note in the form prescribed by the statute (Code, 1876, § 3286). Before the crop was gathered, it was abandoned by B., and gathered by T. and stored in a house on W.'s premises, from which it was afterwards removed and used by T. *Held*, in trover by W. against T. for a conversion of the crops,

(a) That a parol agreement made between W. and T. after B. had abandoned the crop, that T. should have the crop gathered, and after paying his own claim, should pay over the balance of the proceeds of the crop to W. was not void under the statute of frauds as a promise by W. to answer for the debt of B.

(b) That even if the agreement could be construed to be such a promise, there was a new and valuable consideration therefor, which withdrew it from the influence of the statute of frauds.

APPEAL from Barbour Circuit Court.

Tried before Hon. H. D. CLAYTON.

The facts are sufficiently stated in the opinion.

G. L. COMER, for appellant.

PUGH & MERRILL, *contra*.

(No briefs came to the hands of the reporter.)

STONE, J.—This is an action of trover for the conversion by the appellant, Thornton, of seed cotton, alleged to be the property of the appellee, Williams. The facts may be briefly stated as follows: In March, 1881, the appellee, Williams, and one Bird entered into a written contract for the cultivation of a piece of land. The appellee was to furnish the land and team, and Bird the labor; the crop to be divided in unequal shares between them. Subsequently Bird became indebted to appellant, Thornton, for advances, for which he executed his note in the form prescribed by the statute.—Code, 3286. Before the crop was gathered, it was abandoned by Bird, and it was gathered by the appellant and stored in a house upon appellee's premises and near his dwelling. It was afterwards removed

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by the appellant from said house and used by him; and this suit is brought by the appellee for its conversion.

Upon the trial the appellant offered to prove that, after the abandonment of the crop by Bird, appellee entered into an oral agreement with appellant, that appellant should have the crop gathered, and, after paying his own claim, should pay over the remainder to appellee; and he also offered to prove that, in pursuance of the agreement, he did have the crop gathered, and that it was insufficient to pay his claim, and the cotton now sued for is that gathered by him in pursuance of this agreement. The court, upon the objection of the appellee, refused to allow the evidence to be introduced, upon the ground that this agreement was a promise to answer for the debt of another, and, not being in writing, was void under the statute of frauds. The sole question raised by the record is, whether this agreement is a "promise to answer for the debt, default, or miscarriage of another," within the meaning of §2121, of the Code of 1876.

We are of opinion the Circuit Court erred in excluding the evidence. The agreement imposed no liability whatever upon the appellee to answer for the debt of Bird to the appellant. Its effect was simply to allow the lien of the appellant for advances to take precedence of that of the appellee, for the purpose, and upon the condition that he should have it gathered and prevent its destruction and loss to both. But, even if the agreement offered in evidence could be construed to be a promise by the appellee to pay the debt of Bird to the appellant, there was a new and valuable consideration for the promise, which would take it from under the influence of the statute of frauds. "The promise of one person to pay the debt of another, made upon a new and valuable consideration, beneficial to the promisor, is not within the statute of frauds."—*Mason v. Hall*, 30 Ala. 599; *Locke v. Humphries*, 60 Ala. 117; *Dunbar v. Smith*, 66 Ala. 490.

For this error the judgment of the Circuit Court must be reversed, and the cause remanded.

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Bill in Equity to set aside Deed to Lands as Fraudulent and Void.

1. *Conveyance of lands void for actual fraud; grantee chargeable with rents.*—In cases of actual fraud a fraudulent grantee must be considered
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as a trustee of the rents and profits, as well as of the *corpus*, of the property conveyed, and as holding them in the right, and for the benefit of attacking creditors; and hence, where a conveyance of land has been declared void for actual fraud, on bill filed by creditors of the grantor, the grantee is chargeable with rents. (*Marshall v. Croöm*, 60 Ala. 121, overruled on this point.)

2. *Same; from what time rents to be estimated.*—But the rents or profits in such case should only be allowed from the service of the summons on the grantee, as that, strictly speaking, is the true time of the demand on him therefor.

3. *Costs in chancery; taxing of, discretionary.*—In equity the taxing of costs is a matter within the wise and just discretion of the chancellor, and is not revisable in this court.

APPEAL from Marengo Chancery Court.

Heard before Hon. THOMAS COBBES.

This cause was before this court at the December Term, 1879, and is reported under the title of *Thames & Co. v. Rembert's Adm'r*. See 63 Ala. 561. The proceedings were commenced on 16th May, 1872, by bill filed by Frank N. Kitchell, as the administrator *de bonis non* of the estate of James M. Rembert, deceased, a judgment creditor of D. Brooks Jackson, against said Jackson and Lucius Kelly, to have set aside, as fraudulent and void, a deed executed by Jackson on 8th March, 1869, conveying to Kelly real and personal property. On 10th February, 1874, Mrs. P. G. Jackson, the wife of D. Brooks Jackson, the Planters and Merchants' Insurance Co., a corporation, and C. E. Thames & Co. were, by amendment, made parties defendant to the bill, as claiming some interest in the property conveyed by the deed sought to be set aside. Shortly after the execution of the deed to Kelly, he conveyed a portion of the land, thereby conveyed to him, to Mrs. Jackson. This land is known in the proceedings as the "Home place," and the remainder of the lands conveyed to Kelly, as the "Kelly place." Prior to the filing of the bill, Kelly mortgaged the "Kelly place," and Jackson and wife mortgaged the "Home place," to C. E. Thames & Co.; and these mortgages were transferred and assigned to the Planters & Merchants' Ins. Co. by C. E. Thames & Co. D. B. Jackson was liable on the debts secured by both of these mortgages. On former appeal, this court decided, in substance, that the deed to Kelly was fraudulent in fact; that Thames & Co. were entitled to protection, as to the "Kelly place," as *bona fide* purchasers to the extent of their mortgage debt; but that the mortgage by Jackson and wife was void, the deed from Kelly to Mrs. Jackson having created in her a statutory separate estate; and, therefore, that the "Home place" should be condemned to sale for the payment of complainant's demand. The insurance company obtained possession of both places on 1st January, 1874, under said mortgages; and it received as rent of the "Home place" from 1874 to 1880, both inclusive, "less

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taxes, improvements and expenses allowed it, and including interest to April 1st, 1882," the date of the reference before the register, \$948.15. From 1st January, 1881, the complainant received the rents of said place.

After the cause was remanded, a decree was entered, settling the equities of the respective parties in accordance with the opinion of this court on the former appeal, so far as they were then passed on; and decreeing further, that the insurance company was entitled to the \$948.15, rents collected from the "Home place" above mentioned. The Chancery Court also decreed two-thirds of the costs of this suit, "including the costs determined by the Supreme Court," against the complainant, and the balance against the insurance company. It was shown before the register, and by him reported to the court in pursuance of the decree of reference, that the value of the "Kelly place" was \$2,500, and that the value of the "Home place" was \$750.

The decree of the Chancery Court touching the rents of the "Home place" and the costs, is here assigned as error.

W. A. GUNTER, for appellant.—(1) The rents of the "Home place" should have been decreed to the complainant. Rents appertain and belong to the *corpus*, and it is all a trust property, in the hands of the fraudulent grantee, and his assigns with notice, for the impeaching creditors. The defendants lose nothing by being made to account; and fraud would be encouraged, if they were allowed to retain the rents in such cases. It is certainly no argument against this claim in a court of equity, that at law the complainant could not have recovered the rents. When the creditor moves against the grantee in a court of equity, a court for the administration of trusts, and furnished with all the appliances for taking accounts, and the boast of which is, that it is its duty and pleasure to do complete equity, and to extinguish every spark of litigation, it is impossible to figure it out that the creditor is not entitled to the *rents and profits* received by a fraudulent grantee, and his assignee with notice, *pending the litigation*. Until the election to impeach the transaction is made by the creditor, and notice of it brought home to the grantee, there might be equity in saying that a grantee, holding for himself, and especially in cases of voluntary transfers of property, when there has been no actual intent, perhaps, of either party to defraud creditors, should not be called to account for rents and profits; but it would be a direct premium and reward to fraud, to hold that, after the election by the creditor to vacate the deed has been made, and the grantee has thus been, as held by all the authorities, turned into a trustee *in invitum*, the fraudulent grantee is entitled to the rents and profits

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pending a litigation of ten or twenty years, resulting, in the first instance, from his original fraud, and, perhaps, prolonged at his suggestion. The true rule is that of the civil law, which has long been also that of the common law, that no one should be allowed to profit by his own wrong, and that a fraudulent grantee is liable for rents and profits. The following authorities are cited and discussed on this point: *Bump on Fraud*. Con. (2nd Ed.) pp. 591-3; *Stapler v. Hurt*, 16 Ala. 799; *Pharis v. Leachman*, 20 Ala. 663; *Backhouse v. Jett*, 1 Brock. 500; 1 Bland's Ch. Rep. p. 57; *Kipp v. Hanna*, 2 Bland, 26; *Alexander v. Todd*, 1 Bond, 175; *Bean v. Smith*, 2 Mas. 275; *Sands v. Codwise*, 4 John. 536. (2) Against this array of authorities the case of *Marshall v. Croom*, 60 Ala. 121, is relied on by opposing counsel as settling the contrary doctrine. The present case can be distinguished from that case, as the conveyance here attacked was made in secret trust for the grantor. There was no intent to vest the use and beneficial interest in the grantee, as in *Marshall v. Croom*, *supra*; but it was only a *colorable* transaction, and in secret trust for the grantor.—See 60 Ala. pp. 566-9. But it is respectfully submitted that the decision in that case is wrong in principle, and is not supported by the authorities. See authorities cited, *supra*. (3) It is further submitted that in the matter of costs the chancellor has not exercised a wise and equitable discretion, and that, as other equities are reviewed, this court ought to put some or all of the burden of this litigation upon the insurance company and Thames & Co. This point discussed.

R. H. CLARKE, *contra*.—(1) Complainant's original bill charged that Kelly had been enjoying the use of the lands; and, as it must be construed most strongly against the pleader, that is equivalent to an allegation that he held them for his own benefit, and not for the benefit of D. B. Jackson. Had he so held the "Home Place," he would not have been chargeable with rents for the benefit of complainant.—*Marshall v. Croom*, 60 Ala. 121; *Bernheim & Co. v. Beer*, 56 Miss. 149; *Robinson v. Stewart*, 10 N. Y. 189; *Simpson v. Simpson*, 7 Humph. (Tenn.) 275. There is a class of cases in which the constructively fraudulent grantee is held to have a lien upon the property for improvements or other expenditures made by him, upon the ground that the complainant, seeking equity, must do equity as to him; and where he has received profits, they will be set off against his claim, that he may simply be made whole. To this class belongs *Potter & Son v. Gracie*, 58 Ala. 303. There is another class, in which it is the duty of the fraudulent grantee to hold the property and receive its income in another

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capacity, and for the benefit of other parties. To this class belongs *Pharis v. Leachman*, 20 Ala. 662. There is still another class, in which the complainant has a specific claim to the property, drawing to it the right of possession; as where the grantee has by a fraud obtained title and possession from complainant. These cases are instanced as explaining some of the decisions charging the grantee with rents. It is not to be denied, that in some cases of conveyances in fraud of creditors, the grantees have been charged with rents, even where they have held for their own use and benefit. It will be found, however, that in none of them was the attention of the court drawn to the distinction so clearly pointed out in *Marshall v. Croom, supra*. Bump, in his work on Fraudulent Conveyances, p. 569, lays down the proposition that "the grantee may also be charged with the rents and profits that have accrued from the property"; but it is submitted, that most of the cases cited by him in support of the proposition do not sustain it. The one or two that do sustain him seem to consider the lien acquired by the creditor to be in the nature of a right to the possession. (2) Kelly was the fraudulent depositary of the legal title; Jackson remained in possession of the lands, and certainly was not liable for the rents thereof to complainant. As against complainant, Jackson was entitled to possession until a sale, either under his execution or his bill. If that be so, it is difficult to perceive how Kelly can be chargeable for leaving him in such possession. The insurance company held this tract, not under Kelly, but directly from Jackson and wife; and if the latter could not have been charged with rents, for the benefit of complainant, the company, holding *bona fide*, clear of fraud, can not occupy a worse position. It can be charged with rents only upon the theory that complainant had a lien entitling him thereto. But the lien he acquired by his bill was merely an equitable lien, in the nature of an execution lien at law.—*Marshall v. Croom, supra*; *Thames & Co. v. Rembert*, 63 Ala. 573. This lien did not entitle him to possession; and, therefore, it did not entitle him to rents. (3) Costs may be apportioned at the discretion of the chancellor.—Code, 1876, § 3900; 1 Brick. Dig. p. 733, § 1374. The complainant was cast as to more than two-thirds of the value of the property involved in the suit. Surely it was not unreasonable to charge him with two-thirds of the costs. But if this court should consider the costs to have been improperly imposed, it will not reverse solely on that account. 1 Brick. Dig. p. 733, § 1375.

SOMERVILLE, J.—The question presented is, whether the grantee in a fraudulent conveyance is chargeable with the rents
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of the real estate, which has been conveyed to him, the conveyance under which he holds having been declared void for actual fraud, on bill filed by creditors of the grantor. Where the grantee holds under a *secret trust* for the benefit of the grantor, it is every where conceded that he would be chargeable. A distinction was made, however, in *Marshall v. Croom*, 60 Ala. 121, exempting from the operation of this principle the case of a mere fraudulent vendee, who holds under a conveyance, which was intended to vest in him the legal title and beneficial use of the property conveyed. We are asked to review the correctness of this rule as thus declared in this case.

We have given the subject a careful consideration, and are of opinion that this case does not announce the sounder and better doctrine, and ought to be overruled. It is true that there are some forcible reasons in favor of the principle as it is there stated, which have induced its adoption by the highest courts of some of our sister States.—*Robinson v. Stewart*, 10 N. Y. 189; *Simpson v. Simpson*, 7 Hump. (Tenn.) 275. But we are clear in the conviction that the opposite doctrine is not only favored by a sound and controlling public policy, but is sustained by a current of authorities which are rapidly approaching comparative unanimity. The obvious reason is, that a conveyance infected with *actual*, as distinguished from *constructive* fraud, is *void* as to the creditors of the grantor, in all cases where the grantee participates in the fraudulent intent of the grantor. It is the policy of the law to discourage fraud in all of its phases, and especially actual fraud, which involves an intent criminal in its nature, always difficult of detection, furtive in its artifices, and damaging in the dishonesty of its consequences. It is the universal maxim of the law, as it is of common honesty, that no one shall be permitted to build a legal right upon the basis of a legal wrong—that actual fraud can be the source and origin of no right which will be recognized by law. Hence, the rule is that a fraudulent grantee must forfeit every right, legal and equitable, sought to be derived from the fraudulent conveyance, when the courts have once stamped on it the *imprimatur* of their condemnation, declaring it void because of its being infected with fraud. It has been well said “that there is no instance of any reimbursement or indemnity afforded by a court of equity to a *particeps criminis* in a case of positive fraud.”—Bump on Fraud. Con. (3d Ed.) 613.

This principle was applied in *Stapler v. Hurt's Ex'rs*, 16 Ala. 799, 805–6, so as to hold the fraudulent grantee liable for the hire of certain slaves, from the time he obtained possession of them.

The theory of the law in all such cases is, that the fraudulent grantee must be considered as a *trustee of the rents and*

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profits, as well as of the *corpus* of the property itself, inasmuch as he acquired them through his own fraud, and that he, therefore, holds them in the right, and for the benefit of the attacking creditors. In *Bean v. Smith*, 2 Mason, 252, Mr. Justice STORY adjudged the fraudulent grantee to be chargeable with rents of lands declared to have been fraudulently conveyed to him, observing: "The principle is not new that a party who obtains an estate in fraud of the rights of another, shall be held the trustee of him whom he has defrauded. The doctrine has been applied even to those who claim as innocent parties, where it is directly through the fraud, without any intervening acts or considerations of their own; for it is against conscience that one person should hold a benefit derived through the fraud of another." "If the precedent were to be made for the first time," he adds, "I should have no difficulty in holding this doctrine upon the eternal principles of justice and morality."

The same rule was adopted by Judge MARSHALL in *Backhouse v. Jett*, 1 Brock. 500, where all the English authorities are reviewed with that great clearness and discrimination which ever characterize the decisions of this learned jurist. The liability was held to run from *the time of demand made by the creditor*, which was held to be from the date of the filing of the bill.

We need not consume time in reviewing the numerous American authorities holding the same doctrine. These are collated by Mr. Bump in his work on *Fraudulent Conveyances*; and we are of opinion that they are almost unanimous in support of the conclusion we have above announced.—Bump on Fraud. Con. (3d Ed.) 612, note 1; *Jones v. McLeod*, 61 Ga. 602; *Sands v. Codwise*, 4 John. 536; *Brown v. McDonald*, 1 Hill (S. C.), Ch. 297; *Strike v. McDonald*, 1 Bland (Md.), 57; *Ringgold v. Waggoner*, 14 Ark. 69; *Kipp v. Hanna*, 2 Bland (Md.), 26; 1 Freeman on Judg. § 352.

As to the time from which the rents or profits should be estimated, there is a conflict in the adjudged cases. We prefer the rule adopted in *Pharis v. Leachman*, 20 Ala. 662, 687, where they were allowed only from the *service of the summons* on the fraudulent grantee—which, strictly speaking, is the true time of *the demand* on him for the rents. In *Backhouse, Adm'r v. Jett's Adm'r*, 1 Brock. 500, the conclusion reached by Judge MARSHALL, after a full discussion of this particular point, was, that the account should be taken, not from the time of acquiring possession, but from the time of the demand, which he construed to be from the filing of the bill. In the case of fraudulent conveyances, as distinguished from mere secret trusts, at least, this seems the better rule, with the limitation we have above suggested, as followed in *Pharis v. Leachman*, *supra*.

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Under these views, the court erred in refusing to decree to complainant the rents received by the Planters' and Merchants' Mutual Insurance Company from the "Home place," which is described in the pleadings. They are chargeable for such rents from the time of the service of the summons on them, giving notice of the demand made by the complainant.

The taxing of the costs was a matter within the wise and just discretion of the chancellor, and is a matter not revisable in the appellate court.—Code, § 3900; 1 Brick. Dig. 733, § 1374.

The decree of the chancellor is reversed, and the cause remanded, that the proper account may be ordered by the chancellor to be taken by the register.

Mahan v. Smitherman.

Assumpsit.

1. *Amendments; only limitation upon right of, stated.*—The only limitations upon the right of a plaintiff in a civil action at law to amend the complaint, at any time before the cause is finally submitted to the jury and they have retired, are, that the form of action must not be changed, there must not be an entire change of parties, and there can not be the substitution or introduction of an entirely new cause of action.

2. *Same; when common counts may be added to special counts in assumpsit.*—The common counts may be added by amendment to a special count in *assumpsit*, when they are not intended to introduce a new cause of action, but merely as declaring on the cause of action declared on in the special count, only varying the form of the defendant's liability, and when a necessity therefor is disclosed.

3. *Same; when common counts can not be added.*—But if the common counts are intended to represent distinct and separate causes of action from that declared on in the special count, their introduction by amendment would be the substitution or introduction of a new, distinct, independent cause of action, and would not be allowable.

4. *Same.*—The refusal of the primary court to allow an amendment of a complaint declaring on a promissory note, by adding the common counts, is free from error, when there is nothing in the record to authorize the presumption that the common counts were not intended to present a different cause of action from that declared on in the original complaint.

5. *Application of payments.*—When a note gives to the payee a statutory or equitable lien on a crop to be grown by the maker for its payment, and a part of the crop is delivered to the payee, in the absence of instructions or agreement to the contrary, it is his duty to apply the proceeds of the sale thereof to the payment of the note. In such case the contract between the parties makes the appropriation, which can not be varied by the payee, without the consent of the maker.

APPEAL from Chilton Circuit Court.

Tried before Hon. JAMES E. COBB.

[Mahan v. Smitherman.]

This was a suit by W. H. Mahan against Joseph Smitherman, and was commenced before a justice of the peace. The statement of the cause of action filed in the justice's court appears to have been treated as a formal complaint in the Circuit Court, to which the cause was carried by an appeal from the judgment rendered before the justice. The cause of action is therein described as a promissory note for fifty dollars, with a waiver of exemption, the statement failing to show when the note was made, or when it became due and payable. A bill of exceptions was reserved on the trial. It recites that "when said cause was called for trial the plaintiff moved the court to amend the complaint by adding the following additional counts." Then follows three counts, of the character stated in the opinion, each claiming \$87.67, as due on the 1st November, 1879. The court refused to allow the proposed amendment, and the plaintiff excepted. No other pleadings are set out in the record.

On the trial, the plaintiff introduced in evidence a crop-lien note for advances, containing a waiver of exemption, for \$50, dated 15th March, 1879, and payable on 1st of November following, and there rested. Thereupon the defendant was examined as a witness in his own behalf, and testified, in substance, that when the note was made, he did not owe the plaintiff any thing, but that it was made for advances which the plaintiff agreed to let him have from time to time during that year, to the amount of the note; that the advances were made as agreed on, and that after the crop of that year, upon which the note was a lien, was gathered, he delivered to the plaintiff cotton of said crop more than sufficient in value to pay the note, with directions that the proceeds of the sale thereof should be applied to the payment of the note. The plaintiff then testified that the note was made as stated by the defendant; that after the making of the note plaintiff "opened an account with the defendant, and credited him with said note, and charged him with such articles of supplies as the defendant got from time to time under the agreement; that the defendant delivered to him three bales of the cotton of the crop of that year, which cotton he, the plaintiff, sold and gave some of the money to the defendant, and credited his said account with the balance; that the defendant did not give him any direction about the proceeds of said cotton; that the said account commenced after the execution of said note, and, under the agreement to make advances to the defendant, continued on through the year to an amount beyond the amount of said note." The plaintiff then offered to prove the items of this account, but the defendant objected to the offered proof, and the court sustained the objection, and the plaintiff excepted. The bill of exceptions does not purport to set out all the evidence.

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The court charged the jury *ex mero motu* as follows: "That if they believed from the evidence that the note sued on was executed by the defendant to the plaintiff for necessary provisions to make a crop for the year mentioned in said note, and said supplies were to be advanced and delivered to the defendant after the execution of said note, and as required by the defendant; and such advances were made by the plaintiff according to agreement, and charged to the defendant as they were advanced, then, when such advances were made, if so made, to the amount of said note, they were the consideration of the note; and if cotton, grown during the year, and upon the place mentioned in said note, and upon which the parties intended that the note should be a lien, was delivered by the defendant to the plaintiff, and sold by the plaintiff, and from the proceeds of said sale an amount equal to the amount of said note was retained by the plaintiff and credited to defendant on said account, then the said note was paid off and discharged." To this charge the plaintiff excepted.

The trial resulted in a verdict and judgment for the defendant, from which the plaintiff appealed. The rulings of the court above noted are here assigned as error.

WILSON, JOHNSTON & WILSON, for appellant.

Name of counsel for appellee not disclosed by the record.

(No briefs came to the hands of the reporter.)

BRICKELL, C. J.—The statute of amendments is very broad; it is remedial, and the courts have construed it liberally. It is intended to advance the trial and decision of causes upon the real, substantial merits, and to expedite the administration of justice. The only limitation upon the right of a plaintiff in a civil action at law to amend the complaint at any time before the cause is finally submitted to the jury, and they have retired, is, that the form of the action must not be changed; there must not be an entire change of parties, nor can there be the substitution or the introduction of an entirely new cause of action.—*Harris v. Hillman*, 26 Ala. 380; *Leaird v. Moore*, 27 Ala. 326; *Crimm v. Crawford*, 29 Ala. 623; *Pickens v. Oliver*, 32 Ala. 626; *Johnson v. Martin*, 54 Ala. 271; *Stringer v. Waters*, 63 Ala. 361. Subject to this limitation, the right of amendment is unqualified; the effect of a non-joinder or a misjoinder of parties may be cured, the same cause of action may be narrowed or enlarged in varying forms to meet the varying aspects in which the pleader may anticipate its disclosure

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by the evidence, or in which, upon the trial, the evidence may actually disclose it.

In the present case, the original complaint contained a single count founded on a promissory note, having a waiver of exemptions, made by the defendant for the payment to the plaintiff of the sum of fifty dollars, at a specified time. The amendment proposed was the introduction of three common counts—the first, on an account simply in the form prescribed by the Code—the second, for an account stated—the third, for goods, wares and merchandise sold and delivered. Though these counts may represent causes of action entirely different from that represented by the note; though each may depend on separate transactions, contracts, or agreements, and may each assert a distinct, independent liability resting upon the defendant, they could originally have been joined with the count upon the note, if thereby the sum in controversy would not have exceeded the jurisdiction of the justice of the peace, before whom the action was commenced. The Code authorizes the joinder of all causes of action upon contracts, express or implied, for the payment of money, whether under seal or not.—Code of 1876, § 2986. Where at common law a plaintiff had two or more causes of action against the defendant of the same nature, which could be properly joined, if he resorted to more than one action, on application, the court would compel a consolidation.—1 Chitty on Plead. 198; *Powell v. Gray*, 1 Ala. 77. The Code affirms the same rule.—Code of 1876, § 3024. The joinder of the common counts with a special count in *assumpsit*, was at common law, and is under our system, which preserves much of the common law, the better and more appropriate form of pleading, though the purpose is not declaring upon separate and different causes of action, but upon the same cause of action in a different form, to meet any phase in which the evidence discloses the case. Though it is a general rule, that if there is an express contract, there can be no recovery upon a common count founded upon the idea of an implied contract, yet, the special or express contract may have been fully performed, there may remain on the defendant the simple duty to pay money, and, in that case, there may be a recovery upon a common count. The express contract may prove offensive to the statute of frauds, yet, the defendant, having realized all the benefits of the agreement, may be liable on a common count. A bill or note may be misdescribed in the special count, and it may, nevertheless, be given in evidence upon an appropriate common count; or it may be invalid, though founded on an adequate, legal consideration, which, as between the original parties, is recoverable under a common count.—1 Chit. on Pl. 339; *Kirkpatrick v. Bethany*, 1 Ala. 201. The common counts, in

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such case, would not represent different causes of action growing out of separate transactions or contracts. The several counts would be but variations in the form of the liability of the defendant, arising from the same transaction or contract. Each count, in contemplation of law, is the expression and declaration of the same legal cause of action. A principal object of all statutes of amendments, and of the joinder of varying counts in the declaration or complaint is the conformity of the pleadings to the evidence, obviating objections for variance. When the common counts are not intended to introduce a new cause of action—when they are intended only to declare upon the same cause of action which is declared upon in a special count, varying only the form of the liability of the defendant, their introduction by amendment, whenever a necessity for them is disclosed, is allowable. There is not the introduction or substitution of a new cause of action—there is simply the expression in various forms of the liability of the defendant for a single cause of action.—*Smith v. Palmer*, 6 Cush. 513; *Cabarga v. Seeger*, 17 Penn. St. 514. But if the common counts are intended to represent distinct and separate causes of action from that which is declared upon in a special count, though originally they could have been joined with the special count, the introduction of them by amendment would not cure a deficiency in the original complaint, but would be the substitution of a new, distinct, independent cause of action, and would not be allowable. The purpose of the statute of amendments is curing insufficiency or defects in pleading; it is not intended that, under the guise of amendment, there shall be a change or shifting of the cause of action; that must remain as it is presented by the plaintiff in the original complaint. There is nothing in the present record to authorize the presumption that the common counts were not intended to present another cause of action than that which was presented by the original complaint, counting only upon the note. The Circuit Court, therefore, properly refused to allow their introduction.

The charge of the court is unquestionably correct. The note gave to the plaintiff a statutory, or an equitable lien for its payment upon the cotton grown by the maker. When the cotton was delivered to the plaintiff, in the absence of instructions or agreement to the contrary, it was his duty to apply the proceeds of the sale to the payment of the note. The contract into which he had entered made the appropriation, and he could not vary it without the consent of the maker, though to himself another appropriation would have been more beneficial.

Affirmed.

Beard, Adm'r v. Smith.

Petition by Widow of Decedent for Exemption.

1. *Foreclosure of mortgage on real estate by sale; when surplus considered as realty.* When, on the foreclosure of a mortgage on real estate, a surplus remains after paying the mortgage debt, such surplus does not become personalty for the purposes of distribution among the next of kin, or of exemption to the decedent's widow or minor children, but, standing in the place of the equity of redemption, retains all the properties of realty.

2. *Surplus on foreclosure of mortgage on real estate; when widow not entitled to, as exempt.*—Hence, where a mortgage on real estate is foreclosed by sale after the death of the mortgagor, and a surplus, left after paying the mortgage debt, is paid to the administrator, the widow can not claim such surplus as personal property exempt to her under the statute.

APPEAL from Pike Probate Court.

Tried before Hon. W. J. HILLIARD.

J. D. GARDNER, for appellant, cited *Hunter, Adm'r v. Law, Adm'r*, 68 Ala. 365; Code, 1876, § 2841; *Strouse v. Becker*, 44 Penn. St. 209.

GRIFFIN & WOOD, *contra*.—(No brief came to the hands of the reporter.)

STONE, J.—During the lifetime of T. J. Smith, he and his wife, C. E. Smith, executed a mortgage on real estate to secure the payment of a debt. The mortgage contained a power of sale. T. J. Smith died, leaving the debt unpaid, and Beard became his administrator. In addition to the premises mortgaged, Smith had a homestead, which was claimed and allowed to the widow, as exempt from administration. She also asserted her claim to one thousand dollars worth of personal property under the statute. The entire personal assets were, in value, only a little over four hundred dollars, and it was all appraised and turned over to her, leaving her short in her claim of personal property over five hundred dollars. The mortgage debt not being paid, the land was sold under the power of sale contained in the mortgage, yielded a sum sufficient to pay the debt, and left a surplus of some three hundred and ten dollars. That sum was paid to the administrator, and thereupon the widow asserted her claim to it, to make good, *pro tanto*, the deficiency of per-

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sonal property, to make up the thousand dollars the statute exempts. The question is, whether that surplus is to be treated in this contention as real or personal property.

A mortgage is not an absolute conveyance of land. It is not a conversion of real into personal property. It is not, in its nature, the primary or leading transaction. It is accessorial. While, at law, it, to some extent, and between the parties, is treated as a conveyance of the legal title, it is, at last, but a security for the debt; for there can be no mortgage without a debt or duty to be secured by it. It is not even a sale of the mortgage interest; for as between the heir and personal representative, the latter may be made to redeem the mortgaged property, if he have personal assets sufficient to pay that and the other debts of the estate, and there are no prior liens upon it—unless such payment would defeat or impair testamentary disposition of the personalty. 2 Williams on Ex'rs, 1444. A mortgage is what its name imports; a gage, or pledge of the thing mortgaged that the mortgagor will pay the specified debt, or perform the specified duty, as the case may be.—1 Jones on Mort. § 16 and note.

A mortgage may, by foreclosure, become a sale and conveyance; and this not only divests the property of the mortgagor, but, when the foreclosure is by sale, it amounts to a conversion of the mortgage interest into personalty. But it extends no further than the mortgage interest. The equity of redemption remains realty, until foreclosure by sale, and if there be a surplus after paying the mortgage debt, that surplus has all the properties of realty, in all that pertains to descent and devolution. "The proceeds of the sale, after satisfying the mortgage debt, may be said, in general, to stand in the place of the equity of redemption to those who had title or right in that. . . . If he [the mortgagor] has died and his heirs are made parties to the suit, the surplus goes to them."—2 Jones on Mort. § 1687; 2 Scrib. on Dower, 607; *Williamson v. Mason*, 23 Ala. 488; *Chaney v. Chaney*, 38 Ala. 35.

The surplus left after the sale did not become personalty for purposes of distribution or exemption, but retained the quality it had before the sale; that of an equity of redemption in land. It could not be used to supplement the deficiency in the personal property exempt.

Reversed, and the petition of the widow dismissed at her costs in the court below and in this court.

[Houston v. Farriss & McCurdy.]

Houston v. Farris & McCurdy.*Unlawful Detainer.*

1. *Unlawful detainer; character of action.*—Unlawful detainer is a possessory action, in which the only question involved is the plaintiff's right of possession to the premises sued for; an inquiry into "the estate or merits of the title" is expressly inhibited by statute.

2. *Landlord and tenant; tenant not allowed to dispute landlord's title.* It is a well settled rule that a tenant is estopped from disputing his landlord's title, so long as he continues in possession of the demised premises; and hence, ordinarily, he must surrender the possession of the premises, before he can be heard to set up, or assert an outstanding title, adverse to that of his landlord.

3. *Unlawful detainer; when defendant can not set up title adverse to his landlord in defense.*—The plaintiff in an action of unlawful detainer, having derived title by purchase from a testator's sole devisee, the defendant, having entered under a lease from the plaintiff, can not, under the principles above stated, defeat a recovery by showing that he had been appointed administrator of the estate of the testator under whom the plaintiff derived title, and that the latter owed debts at the time of his death, some of which were still outstanding and unpaid.

4. *Exception to rule prohibiting tenant from denying landlord's title; what not within.*—These facts do not show that the landlord's title had expired, or that it had been extinguished; and hence, the case does not come within the established exception to the general principle forbidding a tenant from disputing his landlord's title, that the tenant may always show that his landlord's title has expired, or been extinguished since the creation of the tenancy.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This was an action of unlawful detainer by Mary J. Houston against T. L. Farris and W. D. McCurdy, and was commenced on 18th February, 1881. There was a judgment for the defendants before the justice of the peace before whom the action was commenced, from which the plaintiff appealed to the Circuit Court of Lowndes county. Afterwards, by consent of parties, the venue was changed to the Circuit Court of Montgomery county, where the trial was had, resulting in a judgment for the defendants, from which the plaintiff appealed to this court. The facts are sufficiently stated in the opinion.

JOHN W. BUSH and BRAGG & THORINGTON, for appellant.

D. CLOPTON and R. M. WILLIAMSON, *contra*.

(No briefs came to the hands of the reporter.)
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[Houston v. Farris & McCurdy.]

SOMERVILLE, J.—This is an action of *unlawful detainer*, commenced originally before a justice of the peace. The defendants, Farriss and McCurdy, had rented the land in controversy from the plaintiff for the year 1880. Plaintiff, who is the appellant in this court, had purchased the premises from Mrs. Simonton, the wife and *sole devisee* of one Robert Simonton, deceased, who seems to have died largely indebted. In November of the same year, the defendants procured *letters of administration* to be issued to themselves upon the estate of the deceased in Lowndes county, having become creditors of the estate by a purchase of certain claims. They now seek, in this action against them by their landlord for the possession of the premises, to set up as a defense their right to retain possession as administrators of Simonton's estate. The Circuit Court admitted the letters of administration in evidence, and held the defense to be good, giving the general charge to find for the defendants if the jury believed the evidence.

This charge, in our judgment, was erroneous. The action of unlawful detainer is a *possessory* one, in which the only question involved is the plaintiff's *right of possession* to the premises in dispute, and no controversy can be raised as to the merits of *the title*.—*Clark v. Stringfellow*, 4 Ala. 353; *Russell v. Desplous*, 29 Ala. 308. The statute itself expressly inhibits the bringing into inquiry any question as to "the estate or merits of the title" (Code, 1876, § 3704); and were it otherwise, any arrogation of an authority on the part of a justice's court to try the title of lands would be a clear violation of the constitution of the State.—Art. VI, § 26, Const. 1875. Hence, an *actual* possession, as distinguished from one that is constructive, or imputed by law, is always necessary in order to maintain such possessory actions.—*Womack v. Powers*, 50 Ala. 5; Trial of Titles (Sedgw. & Wait), § 94.

The attempt of the defendants to hold under the authority of their letters of administration was clearly the assertion by them of a *title*, claimed as superior to that of the plaintiff. It was invoking the statutory right of an administrator to take possession of the lands of the decedent for the purposes of administration, for which, as often held, he could even bring ejectment without reference to the solvency or insolvency of the estate.—*McRae's Adm'r v. McDonald*, 57 Ala. 423; *Russell v. Erwin's Adm'r*, 41 Ala. 292. *Title*, in this connection, may be defined to be "the means whereby the owner of lands hath the just possession of his property" (2 Bouv. L. Dict. 596); or "that which constitutes a just cause of exclusive possession," or "which is the foundation of ownership of property."—Webster's Dict. Such evidence could not support ejectment *unless it proved title*. It was accordingly held in *Du-*

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mas v. Hunter, 25 Ala. 711, where the defendant had purchased the premises at sheriff's sale under execution against the plaintiff, and received possession through an under-tenant of plaintiff, even after the expiration of the original tenancy, that the sheriff's deed and proceedings of sale were inadmissible to show that the defendant's "possession was lawful," since it involved an inquiry into the merits of the title. For a like reason it has been held incompetent for the defendant to introduce a sheriff's deed to show the *determination* of the plaintiff's title (*Clark v. Stringfellow*, 4 Ala. 353); or to prove in any manner that the plaintiff's lease, under which he held at the time of defendant's forcible entry, had expired before the trial. *Townsend v. VanAspen*, 38 Ala. 572.

There is another principle upon which the ruling of the court below must be pronounced erroneous. It is based upon the well settled rule that the tenant is estopped from disputing the title of the landlord under whom he holds, so long as he continues the possession originally derived from him. "Hence, when sued for the possession of the demised premises by the landlord, or one succeeding to his rights, the tenant is precluded, as well after the termination of the lease as during its continuance, from calling the title of the plaintiff in question, or from setting up an outstanding title in a stranger, or third person." This principle we conceive to be quite universally settled.—*Bishop v. Lalouette*, 67 Ala. 197, 201; *Borland v. Box*, 62 Ala. 87; *Rogers v. Boynton*, 57 Ala. 501; Taylor's Land. & Ten. § 629.

This doctrine of estoppel rests upon sound considerations of public policy. The tenant obtains his possession upon an implied assurance that he will sacredly recognize the validity of the landlord's title, whatever may be its defects, as against strangers or third persons. As to the tenant, who is entrusted with possession on the faith of his fealty, the title must be taken as conclusively good, and not to be questioned. He can not be permitted to break that faith, which he has thus pledged, the continuance of which must be co-extensive with the period of his possession in the character of tenant. Herman on Estop., §§ 360, 361; Trial of Titles to Land (Sedgw. & Wait), §§ 351, 352; Taylor's Land. & Ten. § 629.

The rule, therefore, is, that before the tenant can be heard to set up or assert an outstanding title adverse to that of his landlord, he must ordinarily first surrender the possession of the premises and regain it afterwards, if he so desires, by action. "The landlord can only be required to litigate title with his tenant upon the vantage ground of possession."—Trial of Titles to Land (S. & W.), § 352; *Norwood v. Kirby's Adm'r*,

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70 Ala. 337; *Russell v. Erwin*, 38 Ala. 44; Herman on Estop. § 360; *Hodges v. Shields*, 18 B. Mon. 827.

It is insisted, however, that while the *general principle* above stated is true, the present case falls within an established *exception* to it, viz.: That the tenant may always show that the title of the landlord has *expired*, or has been *extinguished* since the period of his tenancy commenced. We think there can be no controversy as to the established soundness of the exception contended for, familiar examples of it being in cases where the landlord's only title was an estate for the life of another, which has expired during the term of the lease (*Casey v. Gregory*, 13 Mon. (Ky.) 508; *Ryder v. Mansell*, 66 Me. 167); or where the tenant has during the term purchased in the landlord's reversionary title, under a valid execution, mortgage, or tax sale, or other like alienation of the plaintiff's title (*Randolph v. Carlton*, 8 Ala. 606; *Jackson v. Rowland*, 6 Wend. 666; Trial of Titles (S. & W.), § 358); or has been evicted by title paramount to that of the landlord in a suit by a stranger.—Taylor's Land. & Ten. § 654; *Marsh v. Butterworth*, 4 Mich. 575; Herman on Estop. § 360.

Such a defense can, of course, be good only in actions of ejectment, or trespass to try titles, where the merits of the plaintiff's title can be questioned. It is a manifest effort on the part of defendants to set up an after-acquired title in order to overthrow the title of the one under whom they obtained possession. It clearly does not come within the *exception* above stated, for there has been no change whatever in the *status* of the plaintiff's title except relatively. It has neither *expired*, nor has it been *extinguished*. It has only been overshadowed by a newly created, and recently acquired title. The new right or title, conferred by defendants' letters of administration, was acquired during their tenancy, and was hostile to that of the plaintiff, who should have the option of contesting a right of recovery predicated upon it.—*Owens v. Childs*, 58 Ala. 113. The change in the *status* of defendants does not change the principle. Their legal metamorphosis from mere *tenants* to *administrators* was their own act, and renders none the less necessary the surrender of their possession to the plaintiff before they can in good faith raise the question as to the superiority of their newly acquired title. The policy of the law, among other reasons, is to discourage tenants from speculating in adverse titles hostile to, or in derogation of the title of their landlords.

The judgment is reversed and the cause remanded.

Commercial Bank of Selma v. Brewer.

Bill in Equity by Unsecured Creditors to have Deed of Trust declared a General Assignment.

1. *When fraudulent deed of trust can not be declared a general assignment.*—A deed of trust, made with the intent to hinder, delay or defraud the grantor's creditors, can not be upheld and declared a general assignment, at the suit of creditors not secured thereby against other unsecured creditors who have caused attachments to be levied on the property conveyed by the deed, or who have attacked the deed for fraud.

2. *When deed of trust executed by insolvent debtor fraudulent and void as to creditors.*—A deed of trust executed by an insolvent debtor on 1st April, conveying to a trustee, as security for debts owing to some of his creditors therein named, then past due, his entire stock of goods and merchandise then on hand, and in a certain storehouse, embracing all his unencumbered property, and also all the goods and merchandise he might thereafter bring into said storehouse for the purpose of increasing, replenishing, or keeping up his stock, and expressly providing that the grantor was to "have and retain possession of said property" until the 1st November following, and that if the secured debts were not paid by that time, the deed was to be null and void, with a power of sale on default in payment, but not providing for an extension of the debts,—is fraudulent and void as against the unsecured creditors of the grantor, although neither the trustee nor the beneficiaries had any notice of the grantor's insolvency at the time the deed was executed.

3. *When debt secured by mortgage not extended.*—A stipulation in a mortgage, executed to secure a past due debt, providing for a foreclosure at a future day, is not of itself an extension of the debt.

APPEAL from Shelby Chancery Court.

Heard before Hon. THOMAS COBBS.

The bill in this cause was filed by W. P. Brewer and others against the Commercial Bank of Selma, a corporation, and others, for the purpose of having a deed of trust, executed by Hirscher Bros., a mercantile partnership, to secure certain of their creditors, declared a general assignment. Prior to the filing of the bill said bank and others, unsecured creditors of Hirscher Bros., caused attachments to be issued, and levied on a stock of goods, the property conveyed by the deed of trust; and these goods were in the hands of the sheriff at the time the bill was filed. The other material averments of the bill are sufficiently stated in the opinion. The Chancery Court entered a decree overruling a demurrer to the bill filed by said attaching creditors, and also a motion made by them to dismiss for want of equity. That decree is here assigned as error.

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JOHNSTON & TILLMAN, for appellants, cited *Constantine v. Twelves*, 29 Ala. 607; *Tickner v. Wiswall*, 9 Ala. 305; *Price v. Mazange*, 31 Ala. 701; *Sims v. Gaines*, 64 Ala. 392; Bump. on Fraud. Con. p. 120; *Cheatham v. Hawkins*, 76 N. C. 335; *Holmes v. Marshall*, 78 N. C. 262; *Tennessee Nat. Bank v. Ebbert*, 9 Heisk. (Tenn.) 153; *McCrasly v. Hasslock*, 4 Baxter (Tenn.) 1; *Frost v. Warren*, 42 N. Y. 204.

HEFLIN, BOWDEN & KNOX, *contra*.—(1) The rule is well established that a mortgage or deed of trust which conveys substantially all the debtor's property, for the security of one or more preferred creditors, to the prejudice of other creditors, is made a general assignment by the statute; and on bill filed, it will be declared a general assignment, and executed for the benefit of all the creditors of the grantor.—*Holt v. Bancroft*, 30 Ala. 193; *Warren v. Lee*, 32 Ala. 440; *Stetson & Co. v. Miller*, 36 Ala. 642; *Longmire v. Goode*, 38 Ala. 577; *Shirley v. Teal*, 67 Ala. 449, and authorities there cited. (2) The question of fraud in law or fraud in fact in the execution of the mortgage, that is attempted to be raised by the demurrer, can not be set up by the demurrants against the complainants. The mortgage is not fraudulent on its face.—*Constantine v. Twelves*, 29 Ala. 607; *Price v. Mazange*, 31 Ala. 701. (3) If the mortgage was fraudulent, either in law or in fact, this taint of fraud would not vitiate the mortgage as to the complainants, or render it a nullity. They are not parties or privies to the mortgage; they do not set up the mortgage, and seek to have it foreclosed as the grantors intended it to operate, so as to prefer some of the creditors, and exclude others; but they seek to obtain a decree that will distribute the proceeds of the property conveyed by the mortgage equally among all the creditors of the mortgagors. This relieves the mortgage of the imputation of fraud as to the complainants. *Holt v. Bancroft*, *supra*; *Price v. Mazange*, *supra*.

STONE, J.—The debtor firm in this case, Hirscher Brothers, conveyed a stock of merchandise to certain named trustees, to secure the payment of certain enumerated debts, amounting to twelve or thirteen hundred dollars. The trust deed bears date April 1, 1882, describes the debts as all due or past due at the date of execution, and was signed without subscribing witnesses. The description in the deed of the property conveyed is, "all the stock of merchandise, goods and chattels now contained in the storehouse where said Hirscher Bros. are now doing business in the town of Columbiana, Alabama; also all the merchandise and goods which may hereafter be brought by said Hirscher Bros. into said storehouse, for the purpose of increas-

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ing, replenishing, or keeping up said stock of goods." The deed declares that the conveyance is in trust as follows: "It is hereby agreed that said party of the first part is to have and retain possession of said property until the first day of November, 1882." It then provides that if the enumerated, secured debts are paid by that time, the conveyance was to be null and void. There was a power of sale in case of default. This deed was filed for record November 22nd, 1882.

The present bill was filed by certain named, non-secured creditors, and seeks to have said conveyance declared a general assignment, for the equal benefit of all the creditors. This bill was filed December 19th, 1882. Among other averments, it charges that when the existence of said deed of trust became known, by its registration, November 22nd, 1882, certain other named non-secured creditors of Hirscher Bros.—a third class, different from the two classes above named—sued out attachments at law, and had the goods levied upon. In addition to the prayer to have the said deed declared a general assignment, the bill prayed that said property and its proceeds be apportioned among all the creditors of Hirscher Bros. The bill avers that when said deed was made—April 1st, 1882—Hirscher brothers were in fact insolvent, but their credit was good, and their insolvency unknown, until the said deed was recorded. There was a demurrer to the bill, and the chief ground relied on is, that under the stipulations in the deed, and under the averments of the bill, the deed is shown to be fraudulent, and can not be established as a valid conveyance against the attaching creditors. There can be no question that if, under the averments of the bill, the deed of trust be fraudulent as against the non-secured creditors, the present bill must fail. A fraudulent deed can not be upheld as a general assignment, against a creditor who attaches, or attacks the deed for the fraud.

We think the terms and purpose of the present deed place it substantially within the category of the conveyances which were declared fraudulent in *Tickner v. Wiswall*, 9 Ala. 305; *Constantine v. Twelves*, 29 Ala. 607; *Price v. Mazange*, 31 Ala. 701. In the case of *Constantine v. Twelves*, it was said: "We can not pronounce the deed fraudulent upon its face, because it does not distinctly appear from it, that there were other creditors of the Wests at the time it was executed, that Y. L. West was at the time wholly insolvent, that the deed embraced all the unencumbered property owned by Penelope West, and that its inevitable tendency was to delay and hinder these other creditors." The deed we are considering, and the averments of the bill supply every one of the enumerated facts, the absence of which, it was said in *Constantine v. Twelves*, alone saved that instrument from being declared

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fraudulent on its face. The bill avers that Hirscher Bros. were insolvent, that they owed other, many other enumerated debts; that the deed conveyed their entire property; and the face of the deed shows its "inevitable tendency was to delay and hinder those other creditors."—Bump. on Fraud. Conveyances, 400; *Bodley v. Goodrich*, 7 How. (U. S.) 276; *Cheatham v. Hawkins*, 76 N. C. 335; *Holmes v. Marshall*, 78 N. C. 262; *National Bank v. Ebbert*, 9 Heisk. 153; *McClasly v. Hasslock*, 4 J. Baxt. 1. We might possibly go further, and hold that the deed, under the circumstances shown in this record, is fraudulent, because it reserves a benefit to the grantors.—*Sims v. Gaines*, 64 Ala. 392; *Seaman v. Nolen*, 68 Ala. 463; *Clow v. Woods*, 9 Amer. Dec. 346.

If it be contended that inasmuch as it is not shown that the trustees or beneficiaries under the deed had notice that Hirscher Bros. were insolvent when they made the conveyance, they stand in the relation of innocent purchasers, the answer to this is, if answer be necessary, that they are not purchasers in the sense, that want of notice will protect them. As the case now appears, the beneficiaries were antecedent creditors, no indulgence was stipulated—that is, the secured creditors were not bound to extend them indulgence—and no present, or new consideration was parted with. Delay of the right to foreclose the mortgage was no extension of the debt.—*Sweeney v. Bixler*, 69 Ala. 539.

The chancellor should have sustained the demurrer; but, as there may be a motion to amend, which can only be entertained in the court below, we will simply reverse and remand the cause, to be further proceeded in according to the principles declared above. We confess we can not perceive how the bill can be made good; but we may not be able to see the case in all its bearings.

Reversed and remanded.

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Trial of Right of Property.

1. *Trial of right of property; claimant must have legal title.*—The statutory trial of the right to property levied on under legal process, being merely a cumulative remedy, not superseding the ordinary common law actions of trespass, trover, or detinue, it can be maintained only where, at common law, these actions could have been maintained; and hence, in ac-

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cordance with the rules applicable to these actions, the claimant must have the legal title, or actual possession, and must recover on the strength of his own title.

2. *Same; mortgagee in mortgage of unplanted crop can not maintain.* A mortgage of an unplanted crop does not pass to the mortgagee the legal title to the crop as it may be planted, or as it may come into existence; and hence, he can not maintain, on the title conferred by the mortgage, a statutory claim suit for recovery of the crop, if, when the crop comes into existence, a creditor of the mortgagor should seize it under legal process.

3. *Same; when he may maintain.*—But the equitable title of the mortgagee under such mortgage may be converted into a legal title by some new act on the part of the mortgagor after the crop has come into existence, in ratification and confirmation of the mortgage, as by a delivery of the crop to the mortgagee, or to another for him; and when his title has been thus perfected, it will support a statutory claim suit for the recovery of the crop against an attaching or execution creditor of the mortgagor.

4. *Mortgage on unplanted crop; what act amounts to confirmation.*—A delivery of the crop, after it has been gathered, to the agent of a railroad company for transportation to the mortgagee, is such a new act in ratification and confirmation of the mortgage as passes the legal title.

APPEAL from Chambers Circuit Court.

Tried before HON. JAMES E. COBB.

The Columbus Iron Works Co., having obtained a judgment against one Chisholm in the Circuit Court of Tallapoosa county, caused an execution issued thereon to be levied on five bales of cotton as the property of the defendant in execution. To this cotton Renfro Bros. interposed a claim, and the cotton was delivered to them by the sheriff, an affidavit having been made and bond given as required by the statute. The trial was had "on issue made up and joined under the direction of the court," and resulted in a verdict and judgment for the claimants.

The evidence introduced on the trial tended to show that the execution was received by the sheriff of Chambers county on 12th November, 1880, and was levied on the cotton in controversy on the day following; that at the time of the levy the cotton was in the depot of the East Alabama Railway Company at a station on said road in said county, and was marked with the initials of the defendant in execution; that the cotton was delivered to the railroad company by Chisholm's servant, who told the company's agent that Chisholm had directed him to have the cotton consigned to the claimants; that the cotton was so consigned, and a receipt was given therefor in Chisholm's name, as requested by the servant. The claimants claimed title to the cotton under two mortgages executed by Chisholm and others in November, 1879, "on the crops of said parties to be grown in the year 1880;" and it was shown that the cotton was raised during that year, and was a part of the crop covered by the mortgages.

The plaintiff asked the court in writing to charge the jury

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that, if they believed from the evidence, that the cotton in dispute was delivered to the agent of the railroad company as the property of Chisholm, with instructions to ship it to the claimants, this alone would not amount to a delivery to the claimants. The court refused to give this charge, and, at the claimants' written request charged the jury, in substance, as follows: That, if they believed from the evidence that the cotton was mortgaged to the claimants, and was delivered to the railroad company at a designated station, "to be delivered to" the claimants, the delivery to the company was a delivery to the claimants; and if it was so delivered before the execution was received by the sheriff, then the jury must find for the claimants. To these rulings of the Circuit Court the plaintiff duly excepted; and they are here assigned as error.

N. D. DENSON, for appellant.

W. H. BARNES, *contra*.

BRICKELL, C. J.—The statutory trial of the right to property levied on by legal process has, from its origin, been regarded as merely a cumulative remedy, not superseding the ordinary common law actions of trespass, trover, or detinue. It can be maintained only where, at common law, these actions could have been maintained, and hence, in accordance with the rules applicable to these actions, the claimant must have a legal title to support it, or actual possession, which is but evidence of such title, and must recover upon the strength of his own title.—*Lehman v. Warren*, 53 Ala. 535.

It is the settled doctrine in this court, that a mortgage of an unplanted crop does not pass to the mortgagee a legal title to the crop as it may be planted, or as it may come into existence. In a court of equity it operates by way of present contract, taking effect and attaching to the crop when, and as soon as it comes *in esse*, creating a right the court will enforce and protect against all others than *bona fide* purchasers for value. *Abraham v. Carter*, 53 Ala. 8; *Booker v. Jones*, 55 Ala. 266; *Rees v. Coats*, 65 Ala. 256; *Grant v. Steiner*, *Ib.* 499. Such a mortgagee, not having a legal title, having only an equity, can not maintain a trial of the right of property, if, when the crop comes into existence, a creditor of the mortgagor should seize it on legal process; his remedy for the recovery of the things *in specie* is in equity exclusively.—*Stern v. Simpson*, 62 Ala. 194; *Grant v. Steiner*, *supra*.

While the mortgage of an unplanted crop operates only by way of contract, creating originally merely an equity, yet, after the crop comes into existence, the mortgagor may by a *new act*

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intended to render the mortgage effectual, make it valid and operative, vesting the legal title.—*Abraham v. Carter*, *supra*; *Jones v. Richardson*, 10 Metc. 481; *Head v. Goodwin*, 37 Me. 181. The crop being *in esse*, a visible, tangible, actual chattel, the subject of immediate sale or of transfer, the mortgagor may ratify and confirm his contract, and by ratification and confirmation may convert the equity into an alienation and transfer of the chattel. The character of the *new act*, to which this operation can be ascribed, has been the subject of much discussion; but that a delivery of the thing or chattel itself is unequivocal, vesting the legal title, has not been doubted. The delivery may be to the mortgagee personally, or it may be to his agent, for a delivery to an agent is the equivalent of a delivery to the principal.—*Jones on Chat. Mort.* § 180. And a delivery to a carrier for the purpose of transportation to the mortgagee, will operate to vest title in the latter. Such is the settled doctrine, where there is an executory agreement for the sale of undistinguished or unspecified chattels, or, as between vendor and vendee, or as against third persons, delivery may be essential to the completion of a sale. The delivery to the carrier is such an appropriation to the uses of the vendee, that it vests in him immediately, in contemplation of law, the property in the goods.—*Benjamin on Sales* (1st Ed.), 250; 2 *Smith Lead. Cases* (7th Am. Ed.), 1193.

The mortgage in the present case operated originally merely by way of contract, and created an equity only. But after the crop had come into existence, the delivery to the agent of the railroad company for transportation to the mortgagee was a new act in ratification and confirmation of the mortgage, passing the legal title. The delivery was complete before the execution of the appellants came to the hands of the sheriff, preventing the acquisition of a lien which could prevail over the prior equity and the legal title of the claimants. The delivery was not qualified, or its effect lessened, because the agent of the railroad company gave the mortgagor a receipt for the cotton. The shipment and consignment the mortgagor instructed should be made to the mortgagee, and the receipt was simply evidence of the extent to which he had complied with the obligation of the mortgage.

The rulings of the Circuit Court were in conformity to these views, and its judgment must be affirmed.

Merchants & Planters Line v. Waganer.

Bill in Equity by Stockholders against Corporation and Board of Directors to hold them accountable for Mismanagement of Corporate Trust, for a Dissolution of the Corporation, and Settlement of its Affairs.

1. *Appeal from decretal order on demurrer to bill; what transcript should contain.*—On an appeal from an interlocutory decree on demurrer to a bill in equity, the transcript should only contain the bill and its exhibits, the process and service thereof, the demurrer, the decretal order thereon, the papers pertaining to the appeal, and the register's proper certificates.

2. *Corporation under general law; when regularity can not be questioned.*—On a bill filed by a minority of the stockholders in a private corporation organized under the general law, seeking to hold the corporation and a majority of the directors accountable for alleged mismanagement of the trust, no inquiry can be made as to irregularities in the organization, for the purpose of showing that, by reason of a failure to take some of the preliminary steps required by the statute, there was no proper incorporation.

3. *Bill by minority of stockholders against corporation and directors, seeking to hold them accountable for mismanagement; when without equity.* A bill filed by a minority of the stockholders in a private corporation against the corporation and a majority of the directors, seeking to hold them accountable for a mismanagement of the corporate trusts, charging the directors with a combination and formation of a ring for their own private profit at the expense of the other stockholders, and with acts of wrong-doing and mismanagement, none of which are *ultra vires*, but containing no averment that the corporate effects are imperiled by the insolvency of the parties, or that any request has been made known, soliciting the use of the corporate name in bringing suit against the offending directors, or that any attempt has been made to obtain a meeting of the stockholders for the purpose of obtaining redress for the alleged grievances,—is without equity.

4. *Private corporation; may be dissolved by act of stockholders.*—A private corporation, organized under the general law, for the purpose of conducting a purely private enterprise, entered upon solely for the benefit of the shareholders, no matter of duty, public in its nature, or pertaining to the public welfare, being enjoined or assumed, which would not equally obtain, if the stockholders had, without incorporation, formed a joint stock company or partnership, having the same objects in view, may be dissolved by the stockholders without obtaining the consent of the State; and the duration of its corporate existence may be limited by a by-law adopted at the time of its organization.

5. *Same; dissolution at period fixed by by-law; continuance of business after dissolution; nature of, and rights and duties of parties.*—A by-law of such corporation, adopted at the time of its organization, providing that it shall be dissolved on a designated day in the future, puts an end to the corporation on the day designated; and its continuance thereafter

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is merely permissive, the result of silent acquiescence, and it can only be regarded as a joint stock company, having no fixed duration, and being liable to be terminated at the mere will of any of the parties in interest; but so long as the shareholders continue to act in joint adventure after such dissolution, they must be presumed to have agreed to be governed by the same authority and rules as those which governed the corporation.

6. *Bill by stockholders against corporation and directors; when not multifarious.*—A bill filed by a minority of the stockholders of a private corporation, seeking a dissolution of the corporation, and a settlement of its affairs, is not multifarious, because the complainants are not entitled to joint or co-extensive relief. The complainants are entitled to relief of the same kind; and, in taking the account, complete adjustment should be made among all the parties, plaintiff and defendant.

APPEAL from the Chancery Court of Mobile.

Heard before Hon. JOHN A. FOSTER.

The bill in this cause was filed on the 1st June, 1882, by Louis P. Wagener and G. Floyd Johnston, as stockholders or shareholders in a private corporation, called the "Merchants & Planters Line," against the said corporation, and against Rittenhouse Moore, James G. Stewart, and Frank S. Stone, "directors and active managers of said corporation," together with the other stockholders; and sought a dissolution of the corporation, a settlement of its affairs, and the appointment of a receiver to take charge of its property pending the suit; charging the principal defendants with various acts of misconduct in the management of its business, by which injury was caused to the corporation and the complainants. The bill did not allege that the said association was a corporation, but that it claimed to be a corporation, organized under the general laws of Alabama authorizing and regulating the formation of private corporations, stating the facts touching its organization, and submitted to the court the question, whether, on the facts stated, the association was a corporation; seeking to hold the defendants liable "as individuals doing business under the name of the Merchants and Planters Line, and against said Merchants and Planters Line as a corporation."

The declaration or articles of incorporation were filed in the office of the probate judge of Mobile on the 12th November, 1879, and stated that the corporation was formed "for the purpose of chartering, buying and owning steamboats and other water-crafts, for the object and purpose of establishing and regulating a line of steamboats and other water-crafts to ply and transport freight and passengers" on all the rivers and tributary streams emptying into the bay of Mobile. The stockholders were all owners and part-owners of steamboats, and their boats were turned over to the corporation at an agreed valuation, the shares of stock held by each being determined by the value of his boat. Wagener was one of the original stockholders, and John-

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ston became a stockholder by purchase from Stewart after January, 1881. Rittenhouse Moore was elected president and treasurer of the corporation, and a board of directors was elected consisting of said Moore, F. S. Stone, G. J. Stewart, L. P. Wagener, and V. B. Gunnison; and Gunnison having sold and transferred his interest to Moore, J. Bethéa was afterwards elected a director in his place. The bill alleged that Moore, Stone and Stewart, "being a majority of the board of president and directors, formed a ring or combination to use their said offices of trust for their own personal ends and profit, to the detriment of said association and others holding stock therein; and in pursuance of this design, they met and managed the affairs of said 'Line' by themselves, without directors' or stockholders' meetings, and without giving notice to said L. P. Wagener, who was a director, claiming that, as they constituted a majority of the board, they could and would deal with it as they saw proper, and need not give the minority any notice of their meetings. They fixed the salary of said Moore, as president and treasurer, at \$200 per month, which is a grossly extravagant sum, and which was fixed at that rate, not with reference to the value of his services, but to benefit said Moore," who, it was alleged, was engaged in other kinds of business, and devoted but very little of his time and attention to the business of the corporation; and there were similar charges as to the salary paid G. J. Stewart, \$150 per month, as secretary, and \$50 per month to Frank Ward, "as collector of the bills of the boats," he being a clerk in Moore's employment.

Among other charges of mismanagement and abuse of trust on the part of said Moore, Stone and Stewart, the bill contained the following allegations: "After said company was duly organized, by a resolution adopted at a regular meeting of the said company, said Moore was required to give a bond, as president and treasurer, with good security, in the sum of \$10,000, for the moneys and property coming to his hands, and for the faithful performance of his duties; and another resolution was adopted, requiring him to deposit the money of the company, in its name, in a designated bank in Mobile;" and it was alleged that he had never given any bond, and had never deposited the moneys of the company as instructed, but had intermingled them with his own funds, and had kept and dealt with them as his own. "They have failed to perform their duty in not requiring full, fair and proper returns of the earnings of said steamboats to be made, although they well knew that some of the boats make, and long have made, false returns of their cargoes and freight, greatly to the injury of said company; and they have failed to lay up such boats, but have paid the stockholders representing said boats their dividends, without requir-

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ing them to settle up their arrearages, in violation of the by-laws of the company. They have abused their said offices and trusts by laying up some boats arbitrarily and unreasonably, and especially that of your orator Johnston, so as to prevent him from earning his salary as captain, and also in laying up the boat of your orator Waganer, and have kept other and less suitable boats running, simply to enable the owners of such boats, who are in said ring, to earn salaries as captains; and recently, while capriciously and unnecessarily keeping the boats of your orators laid up and idle, they purchased another boat, called the *Ruth*, and run her for said company, so as to enable them to give employment to J. Woodie Stone as captain, he being also in said ring, and to give employment to men whom said Moore had in his individual employment, and to whom he was liable for salaries. They purchased said steamboat *Ruth* for \$3,200, and for a long time filed no bill of sale for her to said company, in the custom-house at Mobile; and when your orators began to investigate said matter, they recorded a conveyance of her, reciting a consideration of \$5,000; and orators charge, on information and belief, that they are seeking to charge said boat to said company at that price, when they only paid \$3,200 for her. The purchase of said boat was unnecessary, and not to the true interest of said company, and is an attempted speculation for their own private advantage." It was charged, also, that Moore had received large sums of money, by way of *bonus* on cotton brought to Mobile to be compressed, and as *rebate* on charges of freight, drayage, wharfage, etc., and failed to account to the company for these sums; and numerous other wrongful acts were specified.

A demurrer to the bill was filed by all the defendants, jointly and severally, and a separate demurrer by the several defendants who were sought to be charged individually. The causes of demurrer assigned were—1st, multifariousness; 2d, misjoinder of complainants; 3d, non-joinder of necessary parties; 4th, that the corporation was, according to the allegations of the bill, dissolved on the 1st January, 1881; 5th, that for the alleged wrongful acts there was a complete remedy at law in the name of the corporation, and the bill did not show a request and refusal to prosecute a suit in the name of the corporation. The chancellor overruled the demurrer, and his decree is now assigned as error.

MACARTNEY & CLARKE, for appellants.

R. INGE SMITH, and ANDERSON & BOND, *contra*.

STONE, J.—The first forty, and the last four pages of the
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record in this case, contain every thing that can be considered on the questions raised by the present appeal. There are other one hundred and eighteen closely written folio pages, made up of affidavits filed for and against the appointment of a receiver; a motion that was never acted on in the court below, and, of course, is not and can not be the subject of an assignment of error. The appeal is from an interlocutory decree of the chancellor, overruling a demurrer to the bill. Nothing should have come before us except the bill and its exhibits, the process and service thereof, the demurrer, the decretal order of the chancellor, and the papers pertaining to the appeal, with the register's proper certificates. The affidavits were no part of the record, and could not become such, until they were made the basis of judicial action, either in granting, or refusing to grant an order for a receiver. Counsel should have seen to it, that these affidavits were omitted from the transcript, for the double reason, that it would have curtailed more than half the expense of this appeal, and would have left the transcript much less cumbrous. It does not sufficiently appear who is at fault for the insertion of this unnecessary matter, and we therefore make no order in this case in reference to the cost of it. Should another record come before us, needlessly incumbered as this is, we will allow no costs for the superfluous matter.

In November, 1879, ten persons as corporators and shareholders made application to be incorporated under the general laws of the State of Alabama. They filed their declaration in writing, and therein set forth, that their corporate name was to be "The Merchants and Planters Line," and that their corporation was formed "for the purpose of chartering and buying and owning steamboats and other water crafts, for the object and purpose of establishing and regulating a line of steamboats and other water crafts to ply and transport freight and passengers, for proper compensation, on the Bigbee, Little Bigbee, Warrior, and Alabama and Mobile rivers, and all the rivers and streams tributary thereto, and the bay of Mobile." The capital stock was fixed at ten thousand dollars, divided into two hundred shares of fifty dollars each. The ten corporators, in subscribing the declaration, set opposite their names the amount of stock they severally proposed to take, and in this way the whole two hundred shares were taken. They, soon after filing their declaration, held a stockholders' meeting, adopted a system of by-laws, elected five directors, chose one of the number to be president and treasurer, and entered upon their corporate existence, dating from November, 1879.

It is stated that some of the statutory steps, preliminary to a proper incorporation, were not taken; and on that account, the inquiry is raised whether the company ever was in fact in-

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corporated. We use the word inquiry, because it can scarcely be affirmed that counsel contend such is the case. There is nothing in the suggestion. If this were a proceeding by *scire facias*, or in the nature of a *quo warranto*, then this question could be considered. It can not be raised in a proceeding such as this, which is a bill filed by certain stockholders, seeking to hold the corporation and a majority of the board of directors accountable for alleged mismanagement of the trust.—Ang. & Ames on Corp. §§ 777–8; Boone's Man. of Corp. § 203; Morawetz, Priv. Corp. § 658; *Baker v. Backus*, 32 Ill. 79.

Have the complainants averred sufficient facts to authorize them, representing, as they do, a minority of the stock, to come into equity for the redress of the wrongs they complain of, while the corporate powers are still in exercise? Very true, the present bill charges that three, a majority, of the directors have combined and formed a ring for their own private profit, at the expense of the other stockholders, and many acts of wrong-doing are charged against those three directors. No act is charged that is *ultra vires*, and there is no averment that the corporation effects are imperiled by the insolvency of the parties. Neither is there averment in the bill that any request has been made known, soliciting the use of the corporate name in bringing suit against the alleged offenders. Nor is it shown that any attempt has been made to obtain a meeting of the stockholders. In *Tuscaloosa Manufacturing Co. v. Cox*, 68 Ala. 71, the questions presented arose on bill filed by a minority of stockholders. True, the abuses charged in that case were less flagrant than those complained of in this; but the difference is in degree, not in kind. In that case, we ruled that complainants had shown no ground for equitable relief. We said, "in the government of corporations, much must be left to the judgment and discretion of the directory, and much must be credited to the fallibility of human judgment. If it be supposed an unwise course is being pursued, or that the interests of the corporation are suffering, or likely to suffer through the inefficiency or faithlessness of an official, an appeal should first be made to the directory or governing body, to redress the grievance. Failing there, in ordinary cases the next redress will be found in the power of the ballot, which usually comes into exercise at short intervals." We quoted approvingly the cases of *Greaves v. Gouge*, 69 N. Y. 154, and *Brewer v. Boston Theatre*, 104 Mass. 378. In *Haves v. Oakland*, 104 U. S. 450, Justice MILLER, in delivering the opinion of the court, stated that a stockholder could appeal to the courts for relief, "where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders."

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That is precisely what is averred in this case. "But," Justice MILLER adds, "in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach, to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains; and he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." These principles commend themselves to our approval by the strongest of considerations. A corporation, to attain the highest success, should, like a family, dwell together in unity. And when disputes arise between members of this body politic, or law-created household, they should, if possible, be adjusted among themselves. It should be a strong case to justify a resort to personal litigation, which almost invariably leads to personal alienation, if not open hostility.—*Pratt v. Jewett*, 9 Gray, 34.

There is a remaining question. The by-laws, adopted at the stockholders' meeting which organized the corporation, are made part of the bill. By-law number 14 is in this language: "This corporation shall be dissolved on the first day of January, 1881." In *Ang. & Ames on Corp.* § 766, after enumerating several modes by which corporations may be dissolved, the authors say: "To these modes of dissolution may be added one grown to be quite common in this country; the dissolution of a corporation by expiration of the term of its duration, limited by charter or general law." And in section 772 the same authors say: "In this country, the power of a private corporation to dissolve itself by its own assent, seems to be assumed by nearly all the judges who touch upon the point." Many authorities are cited in support of this; but the authors add: "It would seem that, as there are two parties to the charter compact, the assent of both would be necessary to the abrogation of the contract." In *Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 393, the Supreme Court of Massachusetts held that corporations of a private nature, established solely for manufacturing purposes, may by vote, even of a majority of their members, wind up their business and close their operations, if they elect to do so. It will be observed that this right is placed on

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the ground that the corporation was purely of a private nature, in which the public could not be supposed to have any interest. Between such corporation and any joint adventure in which parties may associate themselves, there can be little or no difference, so far as the rights of the public are concerned. In *Morawetz, Priv. Corp.* § 629, speaking of the methods by which such corporations may be dissolved, the author names as one of them, "surrender of the franchises to the State." In section 215, the same author, speaking of clauses limiting the duration of charters, said: "If the provision is intended merely as a limitation upon the duration of the franchises granted to the corporators, there is no reason why the majority should not be held to have implied authority, as in other cases, to wind up the business of the company whenever they deem this to be expedient."

The business of the Merchants and Planters Line, so far as the same is disclosed in the declaration and in the by-laws, appears to be a purely private enterprise, entered upon solely for the benefit of the shareholders. No matter of public duty, or duty pertaining to the public welfare is any where discovered, which would not equally obtain, if the stockholders had, without incorporation, formed a joint stock company, or partnership, having the same objects in view. It would seem this corporation was organized solely for private emolument.

This argument is strongly fortified by the language and policy of our statutes, which make provision for annulling private corporations. It will be observed that such proceeding may be instituted "on the information of any person," and that the judgment of vacation may be pronounced on the single ground that the corporation has surrendered "its corporate rights, privileges and franchises."—Code of 1876, §§ 3419, 3434. We hold that the stockholders of this corporation had the power to dissolve it, without obtaining the consent of the State. This principle was so announced in *Savage v. Walshe*, 26 Ala. 619. See, also, *M. & O. R. R. Co. v. State*, 29 Ala. 573; *McLaren v. Pennington*, 1 Paige, 102; *Enfield Toll Bridge Co. v. Conn. Riv. Co.*, 7 Conn. 45; *Slee v. Bloom*, 19 Johns. 456; *Canal Co. v. R. R. Co.*, 4 Gill & Johns. 1; *McIntyre Poor School v. Zanesville Canal Co.*, 9 Ohio, 203; *Mumma v. Potomac Co.*, 8 Pet. 281.

In the very act of organizing this corporation, the stockholders, by a by-law, fixed the term of its duration. Their language was, it shall be dissolved on the first day of January, 1881. A more solemn agreement and compact could not be entered into. We can not know that in the absence of that compact the corporation ever would have been organized, or its duties entered upon. We hold that such stipulation, embodied

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in the original compact, is at least as obligatory on the stockholders, as a resolution afterwards adopted would be. This put an end to the corporation, as a corporation, January 1st, 1881. Its continuance afterwards was merely permissive, the result of silent acquiescence, and can only be regarded as a joint stock company, having no fixed duration, and liable to be terminated at the mere will of any of the parties in interest. Filing a bill for an account is one mode of putting an end to it. We do not hold, however, that any change had been wrought in the several rights and liabilities of the shareholders, by the agreed dissolution of the corporation. So long as they continued to act in joint adventure, they must be presumed to have agreed to be governed by the same authority and rules, as those which governed the corporation.

There is nothing in the demurrer for multifariousness. The complainants, according to the averments of the bill, are each entitled to relief of the same kind, and to have an accounting and settlement of the enterprise. It is not important, in such a bill, that the complainants shall be entitled to joint, or co-extensive relief. Settlement of the entire accounts is the purpose, and in taking the account, complete adjustment should be made among all the parties, plaintiff and defendant. Each, no matter what his position may be as a party to the record, should have the relief a proper statement of the account entitles him to, and should be held to account for any and all sums he has improperly received. Precisely this, and nothing less, the bill calls for.—1 Dan. Ch. Pr. (5th Amer. Ed.) 341, note 4; Sto. Eq. Pl. §§ 110, 159, 162, 166, 218.

All the present shareholders, if the averments of the bill be true, are made parties to the suit. Of course, there can be no relief for or against any person not a party. The demurrer for non-joinder was properly overruled.

Considered as a bill to settle the accounts of a dissolved corporation, and of its successor, a *quasi* joint stock company, the chancellor did not err in overruling the demurrer.

Affirmed.

Curtis v. Daughdrill.

Action on Promissory Note.

1. *When proper pleadings presumed on appeal to have been filed.*—After the parties, without objection for the want of appropriate pleadings, have proceeded to a trial upon the merits in the primary court, this court will presume, on appeal, that the proper pleadings were filed or waived.

2. *Demurrer to evidence; its effect.*—The effect of a demurrer to evidence is, as declared by statute, an admission upon the record, by the party demurring, of the truth of the evidence, and of every inference or conclusion the jury could legally deduce therefrom; and this is a mere affirmation of the well defined rule of the common law, that if a party voluntarily substituted the court for the jury, the court must render judgment against him, if the jury could have legally found a verdict against him.

3. *Statute of limitations; effect of partial payment.*—The statute gives to a partial payment the effect of removing or arresting the bar of the statute of limitations, only when it is made before the bar is complete; if the bar is complete, a partial payment will not remove it.

4. *Same; credits endorsed on note must be proved.*—Where the fact of a partial payment is disputed, an indorsement on a promissory note, purporting to be of a partial payment made at a time when the bar of the statute of limitations was not complete, is not evidence that the payment was made at the time specified.

5. *Same; effect of credit indorsed on note, on demurrer to the evidence.* But where the bar of the statute is sought to be removed by a partial payment on a promissory note, on which a credit is indorsed, purporting to be a payment made before the bar of the statute was complete, and the credit is shown to be in the handwriting of the plaintiff, the payee of the note, and the note, with the credit thereon, is read in evidence without objection, the court, on a demurrer to the evidence interposed by the defendant, may infer, as the jury might, if the question had been left to their determination, that the payment was made at the time specified in the indorsement, thereby removing the bar of the statute.

APPEAL from Marengo Circuit Court.

Tried before Hon. WM. E. CLARKE.

This was a suit by T. T. Daughdrill against C. S. Curtis, and was commenced on 8th March, 1882. The plaintiff declared on two promissory notes, one for \$73.70, dated 10th February, 1873, and payable one day after date; the other for \$17.00, dated December 10th, 1878, and payable one day after date. The defendant pleaded that "the note of seventy-three 70-100 dollars sued on by plaintiff is barred by the statute of six years." No other plea was filed. The record contains no replications to the plea, nor does it show that any were in fact filed. After stating that the suit was brought on two promissory notes made by the defendant to the plaintiff, which are set out *in hæc ver-*

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ba, and correspond in amount, date, etc., with the notes declared on; and that the note for \$73.70 had two credits endorsed thereon, in the handwriting of the plaintiff, one for \$7.50, as of date April, 1876, and the other for \$7.00, without date, with plaintiff's signatures to the endorsements; and that the defendant only pleaded the statute of limitations of six years to this note, the bill of exceptions proceeds: "The plaintiff, by James T. Jones, his counsel, offered in evidence to the jury the above mentioned and described notes, and asked the court that the same might be read and given in evidence to the jury, to which the counsel for defendant demurred. The court overruled the demurrer, to which defendant excepted." The record also contains a demurrer to the evidence, and a joinder therein by the plaintiff.

The ruling of the court above noted is here assigned as error.

S. M. TORBERT and BRAGG & THORINGTON, for appellant.

J. T. JONES, *contra*.

BRICKELL, C. J.—The replications, if any, which were filed to the plea of the statute of limitations, the only defense interposed, are not shown by the record. The presumption, if necessary to support the judgment, must be indulged that formal replications were waived; or that they were filed and have been lost, or by clerical omission have not been introduced into the record. After the parties, without objection for the want of appropriate pleadings, have proceeded to a trial upon the merits in the primary court, it has long been the practice of this court, on error, to presume that the proper pleadings were filed or waived.—1 Brick. Dig. 782, § 133.

The effect of a demurrer to evidence is declared by statute. It is an admission upon the record, by the party demurring, of the truth of the evidence, and of every inference or conclusion the jury could legally deduce therefrom.—Code, 1876, § 3104. This is a mere affirmation of the well defined rule of the common law, that if parties voluntarily substitute the court for the jury, the court must render judgment against the party inviting it into the relation and province of the jury, if, in the amplitude of their power to determine the sufficiency and weight of the evidence, and to draw from it inferences and conclusions, they could legally have found a verdict against him. 1 Brick. Dig. 883, § 1146.

A partial payment made upon a debt, before or after the bar of the statute of limitations was complete, prior to the Code, operated as an acknowledgment of the debt, from which a new promise to pay could be inferred, arrested the running of the

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statute, and from the day of such payment the bar was thereafter computed. In respect to promissory notes, or other contracts in writing for the payment of money simply, the ordinary and usual mode parties adopt of showing the fact of a partial payment is a credit indorsed upon the note or writing. If the fact of the payment is disputed, it must be shown that it was actually made at the time specified in the indorsement. The indorsement is not, in that event, evidence of the payment; for it may have been made by the holder or payee in bad faith, without the privity or consent of the party to be affected by it.—*Watson v. Dale*, 1 Porter, 247; *McGehee v. Greer*, 7 Port. 537; *Teague v. Corbitt*, 57 Ala. 529. The statute now gives to a partial payment the effect of removing or arresting the bar of the statute of limitations, only when it is made before the bar is complete; if the bar has been completed, a partial payment will not remove it.—Code of 1876, § 3240. The credits indorsed on the note in this case purported to be of payments made before the bar of the statute was complete, and were indorsed in the writing of the payee. These credits were read in evidence without objection—there was no objection to their admissibility. If the cause had progressed to a trial before the jury, the court would doubtless have instructed them, that these credits were not of themselves evidence of payments by the appellant at the times they bore date; that the party relying on them must prove that such payments were made at the times specified, or before the bar of the statute was complete. The fact would have remained, that, as evidence of payments at the times specified, the appellant had suffered them to be introduced without objection. It is certainly not impossible, that the jury would have inferred the appellant was silent, when he would have spoken, if the credits do not speak the truth; and would, as they could have done legally, rendered a verdict against him.—*McGehee v. Greer*, *supra*; *Teague v. Corbitt*, *supra*. The presumption that they would have rendered such a verdict is not violent; they may not have supposed that to them was transferred the duty of pronouncing upon the admissibility of evidence. When by demurrer to the evidence the parties devolve upon the court the duties of the jury, it is simply obedience to the statute to pronounce judgment against them, if the jury could have legally rendered a verdict against them.

Affirmed.

[Rice & Wilson v. Watts.]

Rice & Wilson v. Watts.*Trespass de bonis asportatis.*

1. *Notary public with justice's jurisdiction; power to issue attachments returnable before himself.*—A notary public with the jurisdiction of a justice of the peace has authority to issue an attachment returnable before himself for the collection of a demand within a justice's jurisdiction.

2. *Trespass de bonis asportatis; when attachment competent evidence.* Such attachment is competent evidence for the constable levying it, and the plaintiffs therein, in an action of trespass brought against them by the defendant in the attachment suit, for taking personal property levied on under the writ.

APPEAL from Montgomery Circuit Court.

Tried before Hon. JAMES E. COBB.

This was an action of trespass *de bonis asportatis*, brought by N. Watts against D. S. Rice, Alex. Wilson and J. W. McDade, and was commenced on 21st December, 1881. The cause was tried on issue joined "on the plea of not guilty, and justification under legal process," the trial resulting in a verdict and judgment for the plaintiff. The plaintiff having offered evidence tending to show that the chattels described in the complaint were taken from him, the defendants offered in evidence, as a justification of the act complained of, the affidavits, bonds, and writs, with the endorsements thereon, in two attachment suits commenced by the defendants, Rice & Wilson, who were partners, against the plaintiff, before J. H. Nettles a "notary public and *ex officio* justice of the peace." These attachments were made returnable before said notary, the amount claimed in each being within the jurisdiction of a justice of the peace; and they were levied on the chattels described in the complaint by McDade, acting as constable. On objection of the plaintiff, the court refused to allow these papers to be read in evidence, on the ground that the attachments were issued "by a notary public and an *ex officio* justice of the peace, and that such officer had no power to issue" the same. To this ruling the defendants excepted, and now assign the same as error.

J. M. FALKNER and R. M. WILLIAMSON, for appellants.

RICE & WILEY, *contra*.

SOMERVILLE, J.—This suit is one in trespass, brought against certain creditors of the plaintiff, for wrongfully taking

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personal property levied on by a constable under a writ of attachment issued by one Nettles, who was a notary public and *ex officio* justice of the peace. The constable, who served the process, is also sued as a trespasser and co-defendant.

The attachment papers, under authority of which the levy was made, were excluded from evidence by the court, on the assumed ground, that a notary public, who is appointed by the Governor, having authority to exercise the *jurisdiction* of a justice of the peace, possessed no power to issue such extraordinary process. The question was decided to the contrary in *Griffin v. Appleby*, 69 Ala. 409. It was there held that such an officer, within the precinct or ward for which he is appointed, may exercise the same jurisdiction, and to this end employ the same process as justices of the peace. In *Vann & Waugh v. Adams, Thorne & Co.*, ante p. 475, we held that notaries public had no authority to issue writs of attachments *returnable to a city or a circuit court*—this being a special statutory power conferred on justices of the peace as such, and not appertaining or being appurtenant to their ordinary jurisdiction.

The court erred in excluding the evidence, for which the judgment must be reversed, and the cause remanded.

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Statutory Real Action in the Nature of Ejectment.

1. *Jurisdiction of probate court to order sale of decedent's lands; character of; when decree can not be collaterally assailed.*—The jurisdiction of the court of probate to order a sale of a decedent's lands, for the payment of debts, or for distribution, being statutory, before it can be affirmed to exist, the record of the proceedings must affirmatively show that an application has been preferred by the personal representative, disclosing a statutory ground for the sale; but when the record shows that the court had acquired jurisdiction, irregularities or actual errors can not affect the validity of the proceedings, when collaterally assailed.

2. *Order of sale of decedent's land by probate court; conclusive of what facts.*—In granting such order the court is presumed to have adjudged every fact and question essential to the validity of the order, including the fact that the petitioner is the personal representative of the estate of the decedent whose land is ordered to be sold; and hence, the sale can not be impeached in a collateral proceeding, on the ground that he had ceased to be administrator before the proceedings were begun, or that the grant of letters to him was invalid.

3. *Grant of administration to sheriff; when not void.*—While it is irregular to grant letters of administration upon a decedent's estate to the

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sheriff or coroner, when there is a general administrator capable of acting, unless, in the particular case, there are facts and circumstances which render it improper to commit the administration to him, such irregularity does not render the grant void, or subject it to attack in a collateral proceeding.

4. *Jurisdiction of probate court to grant administrations, general, not limited.*—The jurisdiction of the probate court to grant administrations is derived from the constitution, and is general and unlimited; and when its grants of administration are drawn in question collaterally, they are protected by the presumption extended to the judgments and decrees of all courts of general jurisdiction.

5. *Right of personal representative to bring ejectment.*—The effect of our system, subjecting lands descended or devised to administration, rendering them liable to the payment of the decedent's debts, and conferring upon the personal representative power to rent them, and to intercept the descent, or defeat the devise, by sale under the order of the probate court, is, that the personal representative is entitled to maintain any action at law for their recovery that the heir or devisee can maintain; the right of the heir or devisee yielding to the right of the personal representative when he elects to assert it.

6. *Sale of lands by personal representative; when title of the heirs or devisees not divested.*—Under a sale of lands by a personal representative, made in pursuance of a decree of the probate court, the title of the heirs or devisees is not divested, until a conveyance is executed by the order of the court; and hence, a conveyance of the lands, executed by the personal representative without such order, is wholly inoperative in a court of law.

7. *Same; when administrator de bonis non may maintain ejectment.* Where lands were sold by an administrator in chief under a valid order of the probate court, and the purchase-money was afterwards paid, but no report of its payment was made, and no order was entered directing a conveyance to the purchaser, the administrator executing a deed without such order, the legal title to the lands did not thereby pass to the purchaser, and an administrator *de bonis non* can maintain ejectment against the purchaser for the recovery thereof.

8. *Grant of letters of administration to sheriff expires with the term of office.*—The grant of letters of administration to a sheriff *virtute officii*, by the express language of the statute, attaches to the office; and the grant expires with the expiration of his term of office as sheriff.

9. *Rule of statutory construction.*—No rule of statutory construction rests upon better reasoning than that, in the revision of statutes, alteration of phraseology, the omission or addition of words, will not necessarily change the operation or construction of former statutes; but to have this effect, the language of the statute as revised, or the legislative intent to change the former statute, must be clear.

10. *Same; statute providing grant of administration to sheriff or coroner construed.*—The words, "and not to the person," as used in the act of December 24th, 1822, declaring that a former statute authorizing the grant of letters of administration to the sheriff or coroner should be strictly construed, and that the administration should attach to the office, and not to the person, were employed in the abundance of legislative caution; and hence, the omission of these words from the statute as codified in the Code of 1852, and the Codes subsequently adopted, does not change the operation or construction of the statute.

11. *Grant of administration to sheriff; when no order of revocation required to create vacancy.*—A grant of letters of administration to a sheriff *virtute officii* expiring with the termination of his official term, no subsequent order of revocation is required to create a vacancy; and hence, a grant of administration *de bonis non*, made after his office had expired, without any formal order revoking his letters, is valid.

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APPEAL from Lowndes Circuit Court.

Tried before Hon. JOHN MOORE.

This was a statutory real action in the nature of ejectment, brought by C. E. Reese and E. C. Dunklin, as the administrators *de bonis non* of the estate of Josiah W. Cowling, deceased, against certain tenants of R. N. Landford, who were in possession of the land sued for at the commencement of the suit; and was commenced on 24th March, 1881. Landford came in and made himself a party defendant, and the cause was tried on issue joined on the plea of not guilty; the trial resulting in a verdict and judgment for the plaintiffs.

There was no conflict in the evidence introduced on the trial, and the facts disclosed thereby are substantially as follows: Josiah W. Cowling departed this life, intestate, prior to the year 1868, seized and possessed of about twelve hundred acres of land situate in Lowndes county, in this State, a part of which is the land sued for in this action, and also of some personal property; and leaving him surviving a widow and several children. At the time of his death he was a resident of said county. In 1868, William H. Hunter was elected sheriff of the said county of Lowndes, and duly qualified as such by giving bond with sureties, and taking the oath of office required by law; and he exercised the functions of said office of sheriff until the 11th day of November, 1871, when his term of office expired. One Bryan became Hunter's successor in the office of sheriff, and continued therein until the expiration of his term, November, 1874, when another was elected, who continued in said office during his term. On the 5th January, 1869, said Hunter, by virtue of his office as sheriff, was appointed administrator of the estate of Josiah W. Cowling, deceased, by the probate court of said county, and he thereupon took possession of the real and personal property belonging to said estate, "and made inventories thereof, and duly returned and reported the same to said probate court." On the 11th April, 1870, the estate of the decedent was duly declared insolvent by said court, on the report of said Hunter, as administrator. No selection of administrator was made by the creditors, and Hunter, without any formal order of said court, continued to act as the administrator of said estate. On the 28th October, 1872, on the application of Hunter, as the administrator of said estate, and proceedings regularly had for that purpose, the court granted an order for the sale of certain lands belonging to the estate, embracing the lands sued for; the order requiring "said Hunter, as such administrator, to sell said lands on the following terms, viz: One-third cash, and the balance in two equal annual installments." Under this order a sale was made in 1872, but, on report thereof, it was set aside by the court, and a new sale

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ordered. On the 3d January, 1876, Hunter, as such administrator, made sale of the lands sued for, and at the sale one Tyson became the purchaser at a stated price, one-half payable in cash, and the balance on one year's time, with good security. This sale was reported to the court by Hunter, as such administrator, but no order was made, either confirming or disaffirming it. Afterwards, on the maturity of the balance due on the purchase-money, it was paid to said Hunter, as such administrator; "but no order to make titles had been made by said court. Said Hunter, as such administrator, made title to said Tyson on 3d January, 1877." Tyson took possession of the lands purchased by him at the sale, and held the same until he sold and conveyed them to the parties under whom the defendant claimed title by purchase and conveyance.

"On 11th March 1880, the said probate court, without any notice to Hunter, appointed the plaintiffs administrators *de bonis non* of said estate. There has never been any revocation of the letters of administration granted to said Hunter in 1869. There was never any order removing said Hunter from the administration of said estate, and there was no resignation of the office of administrator by said Hunter, who is still alive.

"It was in evidence that John Tyson had been appointed general administrator for the county of Lowndes in 1867, and that he had accepted said office and had qualified as such general administrator, and that he continued to hold the office of general administrator until 1875. There was no application by said Tyson to administer on the estate of said J. W. Cowling, and there was no application by said Bryan for said estate to be committed to him; and said Bryan never acted as administrator of said estate, and never claimed any right to administer thereon, whilst he continued to be sheriff of said county. There was never any order of the said probate court, committing the estate of the said Cowling to any other person than to said Hunter, until the appointment of the plaintiffs, in March, 1880. There was evidence showing the value of the rents of the land sued for. The plaintiffs have never been in possession of said lands."

Other acts by Hunter, as administrator of said estate, were shown by the evidence. On 2d October, 1871, he sold under an order of the probate court other lands belonging to the estate to one Farley, partly for cash, and balance on time. This sale he reported to the court on 18th November, 1871, and his report and the sale were duly confirmed. In 1872 and 1873, he collected the deferred installments of the purchase-money for the lands sold to Farley; and, on 2d October, 1873, he reported the payment thereof, and asked an order to make titles. This order was granted in January, 1874, and he executed a

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deed to Farley in accordance therewith. In 1873, he made a partial settlement as such administrator, in which he charged himself with the amount he had then collected from Farley. In 1878, and again in 1879, he was ordered by said court to make a final settlement of his administration on said estate; but he never made any final settlement thereof.

The foregoing being the substance of the evidence, the court charged the jury, at the written request of the plaintiffs, that if they believed the evidence, they must find for the plaintiffs; and refused to charge the jury, at the written request of the defendant, that if they believed the evidence, the plaintiffs were not entitled to recover; and that their verdict should be for the defendant. To these rulings the defendant duly excepted; and they are here assigned as error.

WATTS & SONS, for appellant.—(1) The statute very clearly defines the only cases in which the court of probate has jurisdiction to grant administration *de bonis non*; these cases are where the “sole executor, or all of the executors or administrators die, resign, or are removed.”—Code, 1876, § 2412. It is essential to the validity of a subsequent grant of letters, that the first should have terminated.—*Matthews v. Douthitt*, 27 Ala. 273; *Rambo v. Wyatt*, 32 Ala. 363; *Nelson v. Boynton*, 54 Ala. 368; *Griffith v. Frazier*, 8 Cranch, 9; *Hooper v. Scarbrough*, 57 Ala. 510. Hunter’s letters were never revoked, and he never resigned as administrator of the estate of Cowling. Unless, therefore, the expiration of his term of office as sheriff put an end to his right to further administer the estate, the appointment of Dunklin and Reese as administrators *de bonis non* was void, and they can not maintain this suit.—*Matthews v. Douthitt*, *supra*. The want of jurisdiction to make the appointment may be shown even on a collateral attack.—*Gray’s Adm’r v. Cruise*, 36 Ala. 559; *Kingsbury v. Yniestra*, 59 Ala. 320. The presumption in favor of the jurisdiction of the court to make the appointment is rebutted by the facts disclosed by the record. (2) This action can not be maintained unless the orders granted to Hunter, as administrator, after the expiration of his term of office, as sheriff, are absolutely void. At common law administrators *de bonis non* had no interest in any property belonging to the estate, except such as remained *unadministered* by their predecessors. Our statutes have enlarged their rights and duties to some extent; but still they can not sue for personal property which has been disposed of in the due course of administration by the administrator. It is only when the disposition made by the administrator in chief is wholly void, for illegality or fraud, that the administrator *de bonis non* can sue to recover back the property disposed of.—*Swink v. Snod-*

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grass, 17 Ala. 653. Both at common law and under the statute lands of an intestate descend to his heirs, the legal title vesting and remaining in them, unless divested by legal proceedings, or by conveyance. It is true that the powers conferred by statute on an administrator touching his intestate's realty, enable him to maintain ejectment; but this results, not from their having the legal title, but from the fact that the statute confers on them the right of immediate possession, and that is deemed equivalent to the legal title for the purposes of the suit. The legal title still remains in the heirs, and is not divested until a *deed is made* by the order of the probate court, although a regular order of sale has been obtained, and a sale made under it, and confirmed by the court.—*Hamilton v. Hardy*, 52 Ala. 291. But if the administrator in chief has exercised this paramount statutory power, and has obtained an order of sale, has made a sale under the order, and the sale has been confirmed, and the purchaser let into possession, it is certain the administrator in chief could not sue the purchaser for possession of the lands thus sold. The legal title being in the heirs, and the right of immediate possession having been transferred by the sale to the purchaser, and the purchaser thus having the right to possession, the administrator who had sold to such purchaser would have no semblance of right to recover the possession, whatever right the heirs might have at law by and through the strength of their legal title. If the administrator in chief could not maintain such a suit, the administrator *de bonis non* can not maintain it. It is only when the disposition of the property made by the administrator in chief is void, that the administrator *de bonis non* can assert the rights of the estate. (3) The question, then, is narrowed down to this: Was the sale made by Hunter to Tyson *void*, not merely voidable. Whether the sale was void depends on the further question, whether Hunter was the administrator of the estate at the time the order of sale was granted. (4) His appointment as administrator was not *void* because there was a general administrator of the county at the time the estate of Cowling was entrusted to him.—*Coltart v. Allen*, 40 Ala. 155. (5) Did his office of administrator *ipso facto* cease at the termination of his office of sheriff? If the expiration of the office of sheriff did not *ipso facto* put an end to Hunter's right to administer the estate, but was merely cause for his removal from the administration, then, so long as he was permitted to exercise the functions of administrator without resignation or removal, his acts as such administrator were valid, and they can not be attacked collaterally by any successor in the administration of the estate. (6) It was then contended, in an elaborate argument, that Hunter's right to administer the estate of Cowling did not cease, *ipso facto* and *eo instanti*, on the expiration of his

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term of office as sheriff, and the following statutes and authorities were cited and discussed on this point: Code of 1876, §§ 2363, 2364, 2372, 2373, 2376; Clay's Dig. p. 223, § 10; *Governor v. Davis*, 9 Ala. 917; *McLaughlin v. Nelms*, 9 Ala. 925; *Ragland v. Calhoun*, 36 Ala. 606; *Jennings v. Moses*, 38 Ala. 402; *Duke v. Cahaba Nav. Co.*, 16 Ala. 372; *Harrell v. Ellsworth*, 17 Ala. 576; *Sprowl v. Lawrence*, 33 Ala. 674; *Lehman, Durr & Co. v. Warner*, 61 Ala. 455; *Hill v. State*, 1 Ala. 559; *King v. Griffin*, 6 Ala. 387; *Hooper v. Scarbrough*, 57 Ala. 510; *Mosby's Adm'r v. Mosby*, 9 Gratt. 600; *Hutcherson v. Priddy*, 12 Gratt. 85; *Cocke v. Harrison*, 3 Randolph, 494; *Dabney v. Smith*, 5 Leigh, 13; 1 Lomax on Ex'rs, p. 379, §§ 24-5; *Beale v. Hall*, 22 Ga. 449; *Rogers v. Haberlein*, 11 Cal. 120; *Hull v. Neal*, 27 Miss. 424; *Wilson v. Dibble*, 16 Fla. 782; *Davis v. Shuler*, 14 Fla. 438; *Frye v. Kimball*, 16 Mo. 9; *Dwight v. Simon*, 4 La. An. 490; *Thomas v. Adams*, 10 Ill. (5 Gilm.) 319; *Matter of Hamilton's Estate*, 34 Cal. 468; *Levi v. Huggins*, 14 Rich. (S. C.) 166. (7) It may be, that, under our statutes, the judge of probate would have the right to revoke, on the expiration of the term of the office of sheriff, without giving the sheriff notice. It may even be presumed, in a collateral proceeding, that the plaintiffs were properly and legally appointed administrators *de bonis non*; and it may be presumed that the judge of probate revoked Hunter's letters of administration before he appointed Dunklin and Reese. But until this appointment, the presumption is, that the judge of probate never exercised his right to revoke, and that Hunter rightfully continued as administrator until that time. There is no fact showing that the probate court took any judicial action until that time; but, on the contrary, the facts show that, in various ways, and by unequivocal acts, the court recognized Hunter as the rightful administrator down to the time of the appointment of Dunklin and Reese. The only organ of the State whose duty it is to declare who was the administrator, did declare Hunter to be the administrator, after the expiration of the term of the sheriff's office, down to the time of the appointment of the plaintiffs as administrators *de bonis non*. What right, then, did the purchasers have to dispute the authority of Hunter to still exercise the powers and duties of administrator, before any judicial action was taken, declaring that he had ceased to be the rightful administrator? (8) It will be observed that the estate of Cowling was decreed to be insolvent on the application of Hunter, while he was sheriff. There is no dispute or controversy about the validity of this decree, or of its effect. The creditors of the insolvent estate made no selection of an administrator, as they had a right to do, and no one was appointed; but Hunter con-

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tinued to act as administrator, and was recognized as administrator by the court. In such case no new appointment was necessary, nor was there any necessity for an order of the court continuing Hunter as administrator. The presumption is that he was continued by a proper order.—*Clay v. Gurley*, 62 Ala. 14. If, then, it be conceded that the sheriff, to whom has been committed a solvent estate for administration, would cease to be administrator at the expiration of his office as sheriff; yet, a different rule would apply, when the estate is declared insolvent, and the creditors make no selection of an administrator, and the administrator in chief is continued by the court as the administrator of the insolvent estate.

CLOPTON, HERBERT & CHAMBERS, *contra*.—(1) Section 2000 of the Rev. Code, 1867, the statute in force when Hunter was appointed administrator of the estate of Josiah W. Cowling, provides for the appointment of a general administrator of the county. Section 2001 of same Code provides: "*In case there is no general administrator*, and no other fit person will administer, the court *may commit* administration to the sheriff or coroner of the county." At the time the administration was committed to Hunter, there was a general administrator of Lowndes county, who continued in office until 1875. This being the fact, was the order committing the administration to Hunter, as sheriff, void? It has been repeatedly held, and can not, and ought not now to be questioned, that the constitution confers on the probate court original, general and unlimited jurisdiction of the grant of administration, creating it, as to that matter, a court of general jurisdiction. Its orders, therefore, as to the grant of administration, are, when collaterally assailed, protected by the presumption extended to the judgments of all courts of general jurisdiction; and it is not necessary for the record to affirmatively show the ascertainment of the jurisdictional facts. This presumption, however, when the record is silent as to the ascertainment of the jurisdictional facts, and their ascertainment is implied from the mere exercise of jurisdiction, is not conclusive. When the record shows affirmatively that the court in fact ascertained the existence of the jurisdictional facts, this ascertainment is *res adjudicata*, and can not be controverted on a collateral attack, although those facts did not exist. But where the record is silent as to the ascertainment of those facts, then they "will be conclusively presumed to have been ascertained, *unless the record affirmatively discloses the contrary*.—*Burnett v. Nesmith*, 62 Ala. 261. The probate court has general jurisdiction of the grant of administration *de bonis non*. There is no distinction between the character of the jurisdiction which it exercises over the appointment of ad-

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ministrators in chief and of administrators *de bonis non*.—*Rambo v. Wyatt*, 32 Ala. 363. Whilst, therefore, it has been held that it is essential to the validity of a grant of administration *de bonis non*, that the preceding administration should have become vacant by the resignation, death, or removal of the former administrator, it has also been held that it is not necessary that the record of the grant of administration *de bonis non*, when involved in a collateral proceeding, should affirmatively show such vacancy. But the order granting letters of administration *de bonis non* is not *conclusive* evidence of the jurisdiction of the court in the particular case. If, in point of fact, there was no vacancy in the administration when the order was made, the appointment will be held *void*, even in a *collateral* proceeding.—*Gray's Adm'r v. Cruise*, 36 Ala. 559, and authorities there cited. The jurisdiction of committing an administration to the sheriff, and of grant of administration *de bonis non*, is of the same character; and the order committing an administration to the sheriff is not *conclusive* evidence of the jurisdiction of the court. If, in point of fact, there was a general administrator when the order was made, it will be held *void*, even in a collateral proceeding. Another consideration in support of this conclusion is, that when a court of *general* jurisdiction has a special authority conferred on it by statute, it is, *quoad hoc*, an inferior or limited court.—*Gunn v. Howell*, 27 Ala. 663, and authorities there cited; *Foster v. Glazener*, 27 Ala. 391; *Wyatt's Adm'r v. Rambo*, 29 Ala. 510. The power of the probate court to commit an administration to the sheriff, as *sheriff*, thereby making the sureties on his official bond liable for the administration of the estate so committed to him, is a *special authority conferred by statute* upon a court of general jurisdiction after grant of administration; and, therefore, *quoad hoc*, its jurisdiction is limited. (2) It was further contended in an elaborate argument, that Hunter's administration closed at the expiration of his term of office as sheriff; and the following statutes and authorities were cited and discussed on this point: Laws of Ala. p. 196, § 17; *Ib.* pp. 203, 205, § 15; Clay's Dig. § 10; Code of 1852, § 1681, 1690; Code, 1876, § 2376; *King v. Griffin*, 6 Ala. 387; *Saltonstall v. Riley*, 28 Ala. 164; *Ragland v. Calhoun*, 36 Ala. 606; *Payne v. Thompson*, 48 Ala. 535; *Rambo v. Wyatt*, 32 Ala. 363; *Farrow v. Bragg*, 30 Ala. 261; *Bondurant v. Buford*, 1 Ala. 359; *Plowman v. Henderson*, 59 Ala. 559; *Governor v. Pearce*, 31 Ala. 465; *Cuthbert v. Huggins*, 21 Ala. 349; *Morgan v. Ramsey*, 15 Ala. 190; *McCollum v. Hubbert*, 13 Ala. 289; *Bondurant v. Thompson*, 15 Ala. 202; *Levi v. Higgins*, 14 Rich. 166. (3) The cases in this State, cited by counsel for appellants, are not decisions upon the right of *the person* filling the office

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of sheriff, to whom an administration has been committed in virtue of such office, to continue to exercise the powers of administrator after the expiration of his official term, but are decisions as to *the remedies* against the sheriff, as administrator *ex officio*, and the sureties on his official bond. The distinction is between *AUTHORITY* and *remedy*. And the various cases from Virginia, Georgia, Mississippi, Florida, and California, cited by them, are upon statutes unlike ours in this, that there is no declaration, *that the administration attaches to the office*; and they are, therefore, inapplicable. Besides, these decisions were in respect to the liabilities of the officer and his sureties, in which it was not necessary to decide when the administration ceased.

(4) Some stress is placed upon the recognition and treatment, by the probate court, of Hunter as administrator after the expiration of his official term. Such recognition, of itself, can not operate as a grant of administration. Both the acts of Hunter and the recognition by the court, concurring, can not, *proprio vigore*, operate as such grant, any more than if he had never been appointed administrator. His acts under such recognition might estop him from denying that he was administrator, but they can have no other effect. Counsel lose sight of the difference between a *grant* and an *estoppel*. (5) It is, however, further contended, that a different rule applies, when the estate is declared insolvent, and the creditors make no selection of an administrator, and the administrator in chief is continued by the court as the administrator of the insolvent estate. But the estate was declared insolvent upon Hunter's report, *eighteen months before the expiration of his official term*. He was never required to appear and make a settlement, as provided by law in such cases, and the time never occurred when the creditors were authorized to select. The law having terminated his administration, the insolvency proceedings could not continue it in force. (6) After the expiration of his official term as sheriff, Hunter could not be regarded as an administrator *de facto*. *Hooper v. Scarbrough*, 57 Ala. 510.

BRICKELL, C. J.—The jurisdiction of the court of probate to order and decree the sale of lands descended or devised, for the payment of the debts of the ancestor or testator, or to make equal distribution to and among heirs or devisees, is derived from statute. Before it can be affirmed that jurisdiction exists, the record of the proceedings of the court must show affirmatively that a proper application, an application showing the necessity for the sale, has been preferred by the proper party. The only party having capacity to prefer the application is the personal representative. When, by the proper party, the application is preferred, stating or averring the facts which authorize the

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court to exercise jurisdiction, by operation of law jurisdiction is acquired; and if jurisdiction is acquired, irregularities, or even actual errors may intervene, without affecting the validity of the proceedings when drawn in question collaterally. The court is presumed to have adjudged every fact and question essential to the validity of the order or decree. Within its jurisdiction and duty rests the decision of every question occurring in the cause, and whether the decision be correct or erroneous, it is binding on every other court, until reversed by a court of appellate jurisdiction, upon a direct proceeding for its reversal. The court of probate, in decreeing the sale of the lands in controversy, adjudged, and was bound to adjudge, that the petitioner, Hunter, was the administrator of the intestate, Cowling; that the personal estate of the intestate was insufficient for the payment of his debts, and for that purpose there was a consequent necessity to sell the lands.—*Florentine v. Barton*, 2 Wall. 210; *Grignon v. Astor*, 2 How. 319.

The fact that Hunter was, as he averred, the administrator of the intestate, that he was the proper party to make the application for the sale, is as immediately involved, adjudged, and finally adjudged, in the decree of sale, as is the fact of the insufficiency of the personal estate for the payment of debts. The one fact is not more open to evidence and controversy, when the proceedings are assailed collaterally, than is the other. If in either aspect the decree is opened, the facts again litigated, the finality and conclusiveness of the decree are impaired, and all security in performing it is destroyed. Upon this ground I am, therefore, of opinion, that in this case there can be no inquiry whether Hunter was, or not, administrator, when he filed the application and obtained the decree for the sale of the lands.

There was a grant of administration to Hunter, as sheriff, and its validity is now drawn in question, because at the time of the grant there was a general administrator of the county. The statutes manifestly contemplate that the court of probate, in committing administrations, shall prefer the general administrator to the sheriff or coroner. And it is irregular to appoint the sheriff or coroner, while there is a general administrator capable of acting, unless in the particular case there may be facts and circumstances which would render it improper to commit the administration to him. The irregularity may render the grant subject to revocation, voidable, but not void.—*Burnett v. Nesmith*, 62 Ala. 261; *Burke v. Mutch*, 66 Ala. 568.

The jurisdiction of the court of probate to grant administrations is derived from the constitution, is general and unlimited; and when its sentences are drawn in question collaterally, they are protected by the presumption extended to the judgments

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and decrees of all courts of general jurisdiction.—*Coltart v. Alen*, 40 Ala. 155; *Russell v. Erwin*, 41 Ala. 292; *Curtis v. Williams*, 33 Ala. 570.

The statutory system subjecting lands descended or devised to administration, rendering them liable to the payment of the debts of the ancestor or testator, conferring upon the personal representative authority to rent them, or to intercept the descent, or the taking effect of the devise, by obtaining from the court of probate a decree to sell them for the payment of debts, or to make equitable distribution to and among the heirs or devisees, has long been construed as vesting in the personal representative the right and capacity to maintain all necessary suits to recover possession of them—*Philips v. Gray*, 1 Ala. 226; *Masterson v. Gerard*, 10 Ala. 60; *Long v. McDougald*, 23 Ala. 413; *Golding v. Golding*, 24 Ala. 122; *Russell v. Irwin*, 41 Ala. 292.

In *Long v. McDougald*, *supra*, the court held the representative of an insolvent estate was not entitled to maintain ejectment to recover the possession of the lands of the intestate or testator. The decision induced the enactment of the statute, now embraced in the Code, conferring on the representative of an insolvent estate the capacity and right to maintain any action for the recovery of lands, which could be maintained if the estate were solvent.—Code of 1876, § 2588. The effect of the statutory system, and the result of the decisions, is, that the personal representative, because of the authority over the lands with which he is clothed, is entitled to maintain any action for the recovery of lands, which the heir or devisee can by the common law maintain. The right of the heir or devisee yields to the right of the personal representative when he elects to assert it.—*Tarver v. Smith*, 38 Ala. 135.

The bill of exceptions shows directly and affirmatively that Hunter, as administrator, made sale of the lands upon terms different from the terms prescribed in the decree of sale; that he reported the sale to the court of probate, and it was confirmed. Subsequently, the purchase-money was paid to him, and he executed a conveyance to the purchaser. The confirmation of the sale may have purged the irregularity of a sale upon terms different from the terms prescribed in the decree. That question we do not now consider. But Hunter made no report to the court of probate of the fact that the purchase-money had been paid; nor was any application made to the court for an order directing a conveyance to the purchaser; nor did the court order such conveyance. The present statutes, conforming substantially to the pre-existing statutes, require the personal representative making sale of lands, under an order or decree of the court of probate, to report the sale to the court for con-

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firmation. If the sale is confirmed, then, upon the application of the purchaser, or of the personal representative, showing the payment of the whole of the purchase-money, the court is required to order the personal representative, or such other person as the court may appoint, to make to the purchaser a conveyance "of all right, title and interest which the deceased had in the lands at the time of his death."—Code of 1876, § 2468.

The title of lands is never in abeyance; and it is self-evident the statutes intend that the title shall remain in the heirs or devisees, to whom it passed by operation of law, until by a conveyance, executed under the order of the court, it is divested, and vested in the purchaser. Without the order of the court to execute the conveyance, the personal representative has no authority to execute a conveyance which will pass the title. The court is the vendor, not the personal representative, and may in its discretion appoint some other person than the representative to execute the conveyance.—*Hutton v. Williams*, 35 Ala. 503. It is settled by a long line of decisions in this court that under a sale of lands made in pursuance of an order or decree of the court of probate, the title of the heirs or devisees is not divested until a conveyance is executed by the order of the court. A conveyance executed without such order, in a court of law, is wholly inoperative.—*Lightfoot v. Doe*, 1 Ala. 475; *Cummings v. McCullough*, 5 Ala. 324; *Perkins v. Winter*, 7 Ala. 854; *Wallace v. Hall*, 19 Ala. 367; *Bonner v. Greenlee*, 6 Ala. 411; *Doe v. Hardy*, 52 Ala. 291.

The title of the lands remaining in the heirs, the appellees, if the personal representatives of the intestate, were entitled to maintain this action. The administration committed to Hunter was committed to him in his capacity of sheriff; in the words of the statute, it was "attached to the office." The grant of administration to the appellees was made near ten years after the expiration of Hunter's term of office as sheriff by constitutional limitation. The question is whether, with the expiration of his term of office as sheriff, the grant of administration to him in the capacity of sheriff expired?

The first statute authorizing the grant of administration to sheriffs or coroners was enacted in 1821, and provided that if, within three months after the death of any person, no one should have qualified as executor or administrator, or if an administration had become vacant, the judge having jurisdiction could commit the administration to the sheriff or coroner of the county, and unless the judge otherwise ordered, no other oath, bond or security was necessary, than the oath of office already taken and the bond already given. The official bond became a security for the performance of the duties and trusts of the administration.—Laws of Ala. 196, § 17. An amendatory act

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was passed December 24th, 1822, taking effect from and after January 4th, 1823, declaring the statute was to be strictly construed so as to attach the administration to the office of sheriff or coroner, and not to the person.—Laws of Ala. 205, § 15. The administration was subject to be revoked at any time, on the application of the executor, or of any of the kindred or creditors of the decedent, and the executor, or an administrator, permitted to qualify. These statutes remained of force until the Code of 1852 was adopted and became operative.—Clay's Digest, 222, § 10. That Code authorized the appointment of a general administrator in each county, to take charge of the estates of deceased persons, or to act as special administrators in those cases in which the persons entitled would not administer, and no other person was appointed by the court.—Code of 1852, § 1680. It was also provided that, "in case there is no general administrator, and no other fit person will administer, the court may commit administration to the sheriff or coroner of the county." It was further provided that, "when the sheriff or coroner is appointed administrator, the administration attaches to the office, and the official oath and bond of such officer are the security for his faithful administration." These statutes are now embodied in the Code of 1876, forming sections 2362, 2363 and 2372.

The original and the present purpose of these statutes is, to avoid vacancies in the administration of estates, from which injury would result to creditors, and to legatees or heirs, or the next of kin, having the ultimate and beneficial interest in the assets subject to administration. The existence of an administration under the authority of law and the appropriate tribunal, should not rest in the mere choice or discretion of the executors nominated by the will, or of the next of kin, or of legatees, or of creditors having a preferred right to it; or depend upon the fact that for the administration a fit person applies to the court. Therefore, the statutes have empowered the court to appoint a general administrator for the county, who by the acceptance of the appointment is bound to accept the administration of all estates committed to him; or if such an administrator is not appointed, or has ceased to act, or there is in the particular instance impropriety in his appointment, may devolve the administration upon the sheriff or the coroner, who are bound to its acceptance and the discharge of its duties and trusts, as to the performance of any other duty which may be by law imposed upon him.

The office of sheriff does not owe its origin to legislation, nor derive existence from the common law. For it all our constitutions have made express provision, defining with precision and exactness the duration of the official term, and, with the

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exception of a slight change in the present constitution, rendering the sheriff ineligible to serve either as principal or deputy for two successive terms. The duties and the authority of the office are of legislative creation, or drawn from the common law. And of much of the administrative or executive power belonging to the office at common law the sheriff is divested, not by express legislation, but by the transfer of such power to other offices and officers, or because its exercise would be inconsistent with our institutions. The constitution establishing the office of sheriff, defining precisely the duration of the official term, legislative power may be plenary to prescribe the scope and extent of official duty, but it is incompetent to extend or abridge the term of office as fixed by constitutional limitation. Cooley on Con. Lim. 76, and notes. All statutes prescribing the official duties of sheriffs are to be read and construed in connection with the constitutional limitation of the term of office, and can not admit of a construction, without infringing the constitution, which would extend the duty or authority of the sheriff beyond that term. If it were possible, under the act of 1821, that a grant of administration to a sheriff was capable of a construction that would have extended his duty or authority beyond the constitutional term of office, or of a construction that it was a grant to the individual filling the office of sheriff, and designating him as sheriff was mere *descriptio personae*, the legislative intention to avoid and repudiate such construction is clearly manifested by the act of 1822, declaring the act of 1821 was to be strictly construed, not in any and every respect, but in a specified and particularized respect, which is clearly expressed—"so as to attach the administration to the office of sheriff or coroner, and not to the person." In no other respect, for no other purpose, was the act of 1821 modified, changed or amended. Engrafting upon the act of 1821 this particular provision, that the grant of administration was attached to the office of sheriff or coroner, excluding all idea that it was attached to the person, was the whole office and purpose of the act of 1822. The statute was thereby harmonized in words (and all possibility of any other construction excluded) with the constitution and with its policy, prohibiting the sheriff from serving for two successive terms, and this was the legislative intention. The administration, when committed to the sheriff, is an official duty. For the faithful performance of its trusts, the oath of office and the official bond are the security. Now, if authority and duty as administrator were by legislation extended beyond the constitutional term of office, where is the inhibition upon legislative power to extend official authority and duty, as to other statutory duties imposed, or statutory authority conferred, beyond that time? For what length

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of time can such duty and authority be continued? Of what value, or, in view of our legislation, how limited in operation is the mandatory provision of the constitution, of full force when Hunter's term of office as sheriff commenced and expired, that for two successive terms a sheriff should not serve as principal or deputy?

The legislative intention that the grant of administration should attach to the office, continue with it, and expire with it, seems to us plain, and incapable of any just, reasonable doubt. The history of the statutes, to which we have referred, indicates it clearly. The express declaration that the grant should attach to the office, is the equivalent of a declaration that it shall not survive the office. The grant is the appurtenant of the office, and when by constitutional limitation the term of office expires, there is not in it a capacity to survive that to which it was attached, that of which it was the appurtenant, the mere appendage.

The statute, as embodied in the Code, is changed in phraseology, words are omitted which were found in the former statute; but there is no indication of a legislative intent to change or to modify the former statute—certainly not to vary the effect of the administration committed to the sheriff or coroner. No rule of statutory construction rests upon better reasoning than that, in the revision of statutes, alteration of phraseology, the omission or addition of words, will not necessarily change the operation or construction of former statutes. The language of the statute as revised, or the legislative intent to change the former statute, must be clear before it can be pronounced that there is a change of such statute in construction and operation. Sedgwick, Stat. & Con. Law, 428; *Goodell v. Jackson*, 20 (N. Y.) John. 722; *Theriat v. Hart*, 2 Hill, 380; *Conger v. Barker*, 11 Ohio St. 1.

It may well have been supposed by the legislature, that as there was an express declaration the administration should attach to the office of sheriff or coroner, it was not necessary the words of the former statute, "and not the person," should be continued. These words were employed originally merely in the abundance of legislative caution. The expression that the "administration should attach to the office," of itself, excluded an attachment to the person. We can not doubt that a grant of administration to a sheriff does not endure beyond his official term, that by operation of law it expired with the term. Such was the opinion expressed by the court in *Ragland v. Calhoun*, 36 Ala. 606. It may be, the case did not necessarily require the question to be decided; but the expression of opinion was positive, was not hasty, and the result, manifestly, of deliberation. The authorities in other States, sup-

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posed to reach a different conclusion, to which we have been referred, will be found to depend upon statutory provisions essentially different from our statutes.

It is lastly urged, that though the grant of administration to Hunter may have expired with his term of office, the court of probate could not grant a second administration until there was a revocation of the former grant. This is supposed to be the effect of the statute declaring that "letters testamentary, or of administration, and letters appointing a special administrator, or to any general administrator, sheriff or coroner, granted by any probate court having jurisdiction, are conclusive evidence of the authority of the person to whom they are granted from the date thereof until the same are revoked," etc.—Code of 1876, § 2376. By the common law all letters testamentary, or of administration, granted by the tribunal having jurisdiction, and the nature of the administration, whether it be temporary or limited, original or *de bonis non*, is unimportant, were, within the sovereignty from which they emanated, conclusive evidence of the authority of the person to whom they were granted.—1 Greenl. Ev. § 550. Of course, when revoked, they ceased to exist, and were not evidence for any purpose, unless it was of their former existence. Like many other sections of the Code, this section is merely affirmatory and declaratory of the common law. It is not capable of a construction which would extend the authority of an executor or administrator beyond the time appointed by law for its expiration, if there was not the vain act of entering a judicial declaration of its revocation. Things existing are often subject to revocation. A power to an agent or attorney may be revoked. But if by its own terms the power had expired—if the period appointed for its exercise had terminated, it could not be revoked or recalled. The revocation to which the statute refers is a revocation in pursuance of other statutes with which it is connected, and all of which are to be construed *in pari materia*; a revocation of letters of administration, or letters testamentary, which were of force, and which would remain of force, if not revoked. It can have no reference to letters expiring by their own terms, and by operation of law. The administration was vacant when the letters were granted to the appellees; and upon the undisputed facts of the case, their right of recovery is apparent. There was no error in the charge given by the Circuit Court, or in the refusal of the charge requested.

Affirmed.

[Alabama Great Southern Railroad Co. v. Little.]

Alabama Great Southern Railroad Co. v. Little.

Action against Common Carrier for Failure to deliver Goods delivered to it for Transportation.

1. *Common law liability of common carriers; measure of.*—By the common law a common carrier is absolutely liable for the safety of goods entrusted to him for transportation, and is responsible for injuries or losses which can not be directly traced “to the act of God, or of the public enemy, or of the party complaining;” and for goods which he fails to deliver, the measure of his liability is the value of the goods at the place of delivery, at the time when they ought to have been delivered.

2. *Same; to what extent may be limited by special contract.*—It is now well settled that a common carrier may, by special contract, limit or qualify his liability as an insurer, or his common law liability, that is, his liability for losses occurring by unavoidable accidents, not within the exception of “the act of God, or of the public enemy, or the fault of the party complaining,” not only touching the risks or accidents for which he is answerable, but also as to the amount of damages for which he will be liable in the event of loss or injury, when the purpose appears to secure a reasonable and just proportion between his liability and his compensation.

3. *Liability of common carrier; when he can not limit or qualify.* But public policy and every consideration of right and justice forbid that a common carrier should be allowed to stipulate for exemption from, or limitation of his liability for losses or injuries occurring through the want of his own skill or diligence, or that of the servants or agents he may employ, or through his or their willful default or tort.

4. *Same.*—Where a common carrier stipulated in a bill of lading, given for alcohol delivered to it for shipment, that, “in consideration of rates inserted, it is agreed that, in case of loss or damage, the same shall be adjusted at a valuation of twenty dollars per barrel,” he is liable, in the event of a loss not occurring from the want of ordinary care, skill or diligence, only for the amount expressed; but if the loss resulted from a want of ordinary care, skill or diligence, he is liable for the full value of the goods, as for exemption from this liability he has not stipulated, and the law will not tolerate that he should stipulate.

5. *Bill of lading executed by common carrier; when a special contract.* A bill of lading given by a common carrier, on the delivery of goods to him for transportation, and accepted by the shipper or consignor with knowledge of its contents, or with the opportunity of acquiring knowledge thereof, if he is reasonably prudent, limiting the extraordinary liability of the carrier, is deemed and regarded as a special contract.

6. *Liability of common carrier; presumption of negligence.*—Where goods are lost or damaged, while in the custody of a common carrier under a special contract, and he gives no account or explanation of the loss or injury, a presumption of negligence follows, rendering him liable.

APPEAL from Tuscaloosa Circuit Court.
Tried before Hon. WM. S. MUDD.

[Alabama Great Southern Railroad Co. v. Little.]

This was a suit by James Little against the Alabama Great Southern Railroad Company, a corporation operating a railroad, to recover damages for defendant's failure to deliver a barrel of alcohol, received by it as a common carrier, to be delivered to plaintiff at defendant's depot at Tuscaloosa.

On the trial "plaintiff introduced evidence tending to show that R. Macready and Co. had shipped to him a certain barrel of alcohol, purchased of them, which the Cincinnati Southern Railway Company received in the city of Cincinnati, Ohio, as a common carrier, for delivery to the plaintiff at the Tuscaloosa depot on the line of defendant's railroad, near the city of Tuscaloosa, Alabama. Plaintiff also proved that said barrel of alcohol was worth \$104, and that it was delivered to, and received by defendant, as a common carrier, in the city of Chattanooga, Tennessee, and that said barrel of alcohol had never been delivered to the plaintiff." The bill of lading was read in evidence, and a copy thereof is made an exhibit to the bill of exceptions. The terms of the bill of lading, and the other facts disclosed by the evidence, necessary to an understanding of the points decided by the court, are sufficiently stated in the opinion; the point of contention being the proper construction and the effect of a special contract contained in the bill of lading, limiting the defendant's liability.

The Circuit Court, having in its general charge instructed the jury that the special contract, if made in consideration of a reduction in the rate of freight, was reasonable, "further charged the jury as follows: That if they believed from the evidence, that the barrel of alcohol had been delivered to defendant, as a common carrier, for transportation to the Tuscaloosa depot, and that it had never been delivered to plaintiff, then the burden of proof was on the defendant to show affirmatively, that it was not guilty of negligence in the loss of said barrel of alcohol." To this charge the defendant excepted. The defendant then asked the court in writing to charge the jury as follows: "That the act which will deprive a carrier of the benefit of a contract for a limited liability, fairly made, must be an affirmative act of wrong-doing, not merely ordinary neglect in the course of the bailment. It need not necessarily be intentional wrong-doing, but the mere omission of ordinary care, in the safe-keeping and carriage of the goods, is not the misfeasance which will deprive the railroad company of the benefit of the limitations of the contract." This charge the court refused to give, and the defendant excepted. The trial resulted in a verdict and judgment for the plaintiff for the full value of the alcohol.

The rulings of the Circuit Court above noted are here assigned as error.

[Alabama Great Southern Railroad Co. v. Little.]*

WOOD & WOOD and S. F. RICE, for appellant, cited *Penn. R. Co. v. Henderson*, 51 Pa. St. 315; 8 Penn. St. 479; 16 *Ib.* 67; 30 *Ib.* 242; 32 *Ib.* 414; 53 *Ib.* 140; 63 *Ib.* 14; 24 N. Y. 196; 26 Barb. 641; 25 N. Y. 445; 1 Kern. 485; *Ib.* 192; 17 Wall. 370; *Steele v. Townsend*, 37 Ala. 252; 16 Penn. St. 67; 6 How. (U. S.) 384; 12 How. (U. S.) 280; 30 Penn. St. 242; 55 *Ib.* 140; 29 Barb. 602; 24 N. Y. 181; 49 N. Y. 263; 42 Mo. 88; 32 Md. 333; 17 Mich. 57; 42 Ill. 89; 11 Wall. 129; 18 N. Y. 543. *Magnin v. Dinsmore*, 70 N. Y. 410; S. C. 26 Amer. Rep. 610; 43 N. Y. 123;

J. M. MARTIN, *contra*, cited *S. & N. R. R. Co. v. Henlein*, 52 Ala. 606; *Magnin v. Dinsmore*, 70 N. Y. 410; S. C. 26 Amer. Rep. 608; *York Co. v. Central R. R. Co.* 3 Wall. 107; Lawson's Con. of Carriers, pp. 158, 159, 435; *Orndorff v. Adams Ex. Co.*, 3 Bush. 194; *Kirby v. Adams Ex. Co.* 2 Mo. 369; *Ill. Cent. R. R. Co. v. Morrison*, 19 Ill. 136; *Steinweg v. Erie R. Co.* 43 N. Y. 123; S. C. 3 Amer. Rep. 673.

BRICKELL, C. J.—By the common law a common carrier is absolutely liable for the safety of goods entrusted to him for transportation; he is responsible for all injuries or losses, which, in the language of the books, can not be directly “traced to the act of God, or of the public enemy, or of the party complaining.”—1 Smith's Lead. Cases (7th Amer. Ed.), 411. For goods which he fails to deliver, the measure of his liability is the value of the goods at the place of delivery, at the time at which they ought to have been delivered.—Angell on Carriers, § 482. Proof that goods entrusted to him for transportation and delivery have not been delivered, a reasonable time for transportation and delivery having passed, is *prima facie* evidence of a loss by his fault or negligence, and sufficient to charge him with their value.—*M. & W. P. R. R. Co. v. Moore*, 51 Ala. 394; *S. & N. R. R. Co. v. Henlein*, 52 Ala. 606; Angell on Carriers, § 202.

The liability of a common carrier is sometimes said to be of a dual nature; the one, a liability for losses by his own negligence or omission of duty, or that of his servants or agents, which is the liability of an ordinary paid agent or bailee; the other, a liability for losses by mistake or accident without any fault on his part; for losses occurring by unavoidable accidents, not within the exception of “the act of God, or of the public enemy, or the fault of the party complaining,” which is of the nature of the liability of an insurer, having its origin and foundation in the policy of the common law.—*Davidson v. Graham*, 2 Ohio St. 131. Whatever doubts may at one time have been entertained, it is now well settled, that by special contract

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the carrier may limit or qualify the liability resting on him as an insurer, or his common law liability, as it is most often expressed.—*Steele v. Townsend*, 37 Ala. 247; *M. & O. R. R. Co. v. Hopkins*, 41 Ala. 486; *M. & O. R. R. Co. v. Jarboe*, *Ib.* 644; *S. & N. R. R. Co. v. Henlein*, *supra*. The limitation of liability may extend, not only to the risks or accidents for which the carrier will be answerable, but to the amount of damages for which he is liable in the event of loss or injury, when the purpose appears to secure a just and reasonable proportion between the amount for which he is liable and the freight which he is to receive.—*S. & N. R. R. Co. v. Henlein*, *supra*; *S. C.* 56 Ala. 368. In the limitation of liability, the carrier can not, in any event, stipulate for more than an exemption from the extraordinary liability the common law imposes; the liability extending beyond that of ordinary paid agents, servants, or bailees, denominated the liability of an *insurer*. Public policy, and every consideration of right and justice forbid that he should be allowed to stipulate for exemption from liability for losses or injuries occurring through the want of his own skill or diligence, or that of the servants or agents he may employ, or through his own or their willful default or tort.—*Steele v. Townsend*, *supra*; *M. & O. R. R. Co. v. Hopkins*, *supra*; *M. & O. R. R. Co. v. Jarboe*, *supra*; *S. & N. R. R. Co. v. Henlein*, *supra*; *R. R. Co. v. Lockwood*, 17 Wall. 357; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344. A bill of lading given by the carrier, on the delivery to him of goods for transportation, and accepted by the shipper or consignor with knowledge of its contents, or if he is reasonably prudent, with the opportunity of acquiring knowledge, limiting the extraordinary liability of the carrier, is deemed and regarded as a special contract.—*Steele v. Townsend*, *supra*.

In the present case, the bill of lading, given on the receipt for the goods which have never been delivered, on its face stipulates, "that, in consideration of rates inserted, it is agreed that, in case of loss or damage, the same shall be adjusted at a valuation of twenty dollars per barrel." The bill of lading carefully stipulates for the exemption of the carrier issuing it, if the freight was delivered to a connecting line for transportation to its destination; and there are several of its stipulations that might provoke remark, as to the care with which the carrier receiving the goods was seeking to absolve itself and its associates in transportation from all liability. We confine ourselves to the case before us. The shipment was of a single barrel of alcohol, and its delivery in good order to the appellant, a connecting line with the carrier issuing the bill of lading, for transportation to a station on the appellant's line of road, is an undisputed fact. The fact is also undisputed, that a reasonable time for transporta-

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tion and delivery having passed, on demand, the barrel was not delivered to the consignee, nor was any explanation given for the failure to deliver. There was no pretense of its loss by accident of theft, nor that any cause intervened which absolved the appellant from the duty of delivery, if it had been a gratuitous bailee.

The affirmative instruction given by the Circuit Court recognizes the reasonableness of the limitation as to the amount of damages for which the carrier or its associate in transportation was liable in the event of loss, if it was made in consideration of reduced freight; but affirms that if there was delivery to the appellant, and a failure to deliver at the point of destination, the burden of proof was on the appellant to acquit itself of negligence because of the failure to deliver. The general rule, applicable to all bailees of goods, chargeable with losses or injuries occurring from negligence, is, that if upon demand made, they fail to deliver, and do not account for the failure, negligence will be imputed, and the burden of proving a loss without the want of ordinary care is devolved upon them.—*Seals v. Edmondson, ante*, p. 509. When the risks or accidents for which a common carrier is liable are limited by a special contract, the burden of proof rests on the carrier to show, not only that the cause of the loss was within the terms of the limitation, but also that, on his own part, there was no negligence. "The correct view," said R. W. WALKER, J., in *Steele v. Townsend, supra*, "is, that the loss is not brought within the exception, unless it appears to have occurred without negligence on the part of the carrier; and, as it is for the carrier to bring himself within the exception, he must make at least a *prima facie* showing that the injury was not caused by his neglect." In 2 Greenleaf's Evidence, § 219, it is said: "In all cases of loss by a common carrier, the burden of proof is on him to show that the loss was occasioned by the act of God or by public enemies. And if the acceptance of the goods was *special*, the burden of proof is still on the carrier to show, not only that the cause of the loss was within the terms of the exception, but also that there was, on his part, no negligence or want of due care." The carrier can not stipulate for an absolute, unqualified exemption from all liability, nor can he stipulate that he will answer, in any and all events, only for a sum less than the value of the goods, because, in consideration of reduced rates of freight, the shipper may assent to it. For immunity from liability for his own frauds no bailee can stipulate; "for no man shall contract to be safely dishonest."—Story on Bailments, § 32. This is the rule as to bailees who do not exercise public employments, who are not bound to the duty of serving all who may require their services, who may select their own customers, and

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by contract determine and fix the terms and conditions upon which services will be rendered. A common carrier exercises a public employment, is bound to the duty of receiving and carrying for reasonable rates all goods offered for transportation. Story on Bailments, § 508. Standing in this relation, no contract can be made by him, which will relieve him from liability for the want of the care and diligence which is exacted of other paid bailees. Limitations or restrictions upon their liability are taken most strongly against them, and, however general the terms in which they are expressed, are not so construed as to relieve them from liability, if they do not exercise ordinary care, skill and diligence—the care and diligence prudent men in similar circumstances usually exercise in the management of their own business.—*Hooper v. Wells*, 27 Cal. 11. Conceding full effect to the limitation found in this bill of lading, the carrier, in the event of a loss not occurring from the want of ordinary care, skill and diligence, would be liable only for the amount expressed. That is the extent of the liability as an insurer. But for the want of ordinary care, skill and diligence, from which a loss results, he is liable for the value of the goods, as would be any other paid bailee or agent, and for exemption from this liability he has not stipulated, and the law will not tolerate that he should stipulate. The presumption that the goods were lost from his want of diligence, is more favorable than any other which can reasonably be indulged. The delivery of the alcohol to him in good condition for safe transportation is undisputed, and for a failure to deliver at the point of destination no excuse or explanation is offered. If a bailee, having possession, the care and control of goods, will not or can not account for a refusal or failure to deliver, the presumption is not violent that he has been negligent, if he has not wrongfully converted, or wrongfully retains them. The better authorities, we are of opinion, maintain that when goods are lost or damaged, while in the custody of the carrier under a special contract, and he gives no account or explanation of the loss or injury, a presumption of negligence follows of course, for which he is liable.—*Furnham v. C. & A. R. R. Co.*, 55 Penn. St. 53; *Am. Express Co. v. Sands*, *Ib.* 140.

The charge requested was extracted almost literally from the closing sentence of the court in *Magnin v. Dinsmore*, 70 N. Y. 410, (S. C. 26 Am. Rep. 608). The case belongs to that class of cases in the New York courts, reviewed in *Railroad Company v. Lockwood*, 17 Wall. 357, which holds that common carriers may stipulate for exemption from liability for the negligence of themselves or their servants. That rule has not prevailed in this court; on the contrary, we have adhered to the doctrine, that a contract by which a carrier undertakes to

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limit his common law responsibility, can not be employed to relieve him from losses or damages resulting from his negligence.

We find no error in the rulings of the Circuit Court, and its judgment is affirmed.

INDEX.

ACCOUNT.

1. *Account stated; presumption of correctness.*—If an account is rendered to a debtor, and he admits its correctness, or retaining it, he makes no objection thereto within a reasonable time, he will be bound by it as an account stated, his silence, in the latter event, being an implied admission of its correctness; and if he only objects to one item, this is an admission of the correctness of the other items of the account. *Burns v. Campbell, 271.*

ACTION.

1. *Action for damages to personal property; possession sufficient title against trespasser.*—Possession of personal property, carrying with it a presumption of ownership which is not disputable by a trespasser who does not connect himself with the legal title, will support an action in tort for damages done thereto by such trespasser. *Ala. Gt. Sou. R. R. Co. v. Jones, 487.*
2. *Same; plaintiff's right to bring suit not affected by possession of servant.*—In such action, the plaintiff relying on possession for title, the fact that the personal property was in the custody of an overseer or servant of the plaintiff, who did not assert any interest in it, or possession of it, as distinguishable from the plaintiff's possession, does not affect the plaintiff's right to maintain the suit. *Ib. 487.*
3. *When money, the proceeds of the sale of mortgaged chattels, can not be recovered by transferee of mortgage against party receiving it from mortgagee.*—R. having executed a mortgage to M. & T. upon a crop to be grown by him on a designated place, to secure advances obtained by him from them, M. & T., after having the mortgage duly recorded, transferred and assigned it to R. & W. After the assignment, and without notice thereof, R. delivered two bales of the crop conveyed by the mortgage to M. & T., and M. shipped it in his own name to warehousemen in the city of Montgomery for sale. The cotton having been sold, M. purchased of J. & Bro., merchants in said city, a bill of goods, giving them in payment an order on the warehousemen for \$134.73, expressing that it was the proceeds of three bales of cotton. This order was paid, on presentation, to J. & Bro., \$98.20 thereof being proceeds of the sale of the two bales of cotton which R. had delivered to M. & T.; J. & Bro. having at the time no notice that the cotton did not belong to M., or of the manner in which he obtained it, or of the assignment of the mortgage. *Held*, in an action of *assumpsit* brought by R. & W. against J. & Bro. to recover the proceeds of the sale of the two bales of cotton paid to them by the warehousemen, that the defendants had the right to presume that the money paid to them belonged to M., and, having received it without knowledge, in good faith, and upon a valuable consideration, they were entitled to retain it; and the plaintiffs could not recover. *Rice & Wilson v. Jones & Bro., 551.*

ADVERSE POSSESSION.

1. *What necessary to avoid deed to land.*—To avoid a deed to land on the ground that the land was in the adverse possession of another at the time the deed was executed, there must be an actual adverse holding under claim of right. *Eureka Co. v. Edwards*, 248.
2. *What necessary to avoid deed made by one out of possession.*—While to avoid a deed to land executed by one out of possession, it is enough, if there be one in adverse possession, exercising acts of ownership, and claiming to be rightfully in possession, with or without color of title, such adverse possession, to have this effect, must be actual, not constructive; and it must be marked by acts of dominion, such as the erection of houses, making valuable improvements, clearing lands, claiming ownership, or, by some other act, evidencing that the possession is under claim of right. *Bernstein v. Humes*, 260.
3. *Same; when possession under claim of right.*—Putting a tenant in possession, who erects a house thereon, and continues to occupy for a series of years, is, unexplained, a possession under claim of right. *Ib.* 260.
4. *Same; what is actual possession and its effect as notice.*—Actual possession is an open, patent fact, which furnishes evidence of its own existence; and it is notice to all men contracting in reference to the property thus possessed, and is equivalent to actual notice of title, legal or equitable, or of the claim under which such possession is held. *Ib.* 260.
5. *Actual adverse possession; what notice sufficient to avoid deed by one out of possession.*—In order to avoid a deed executed by one out of possession on the ground of an actual adverse possession by another under claim of right, actual notice of such adverse holding is not required, but the notice implied from possession is sufficient. *Ib.* 260.

AGENCY.

1. *Principal ratifying trespass by agent after suit brought, can not be made defendant.*—If an agent, acting in the name, and for the benefit of his principal, commits a trespass *de bonis asportatis*, which imposes a civil, and not a criminal liability upon the agent, the principal may, when fully informed of the tortious nature of the act, adopt and ratify it; and such ratification, for many purposes, will relate back to the date of the unauthorized act, so as to constitute the principal a trespasser *ab initio*, ordinarily binding him to the same extent and imposing on him the same civil responsibilities as if he had originally authorized it; but this doctrine of relation, being a mere legal fiction, and allowed only for the advancement of right and justice, can not be so applied as to authorize the principal to be made a party defendant by amendment to a suit brought against the agent for such trespass, and commenced prior to his ratification of the agent's act. *Burns v. Campbell*, 271.
2. *Trespass by agent; ratification by principal.*—To hold the principal responsible for damages resulting from a trespass *de bonis asportatis*, which is not indictable, on the ground of a subsequent ratification by him of the agent's wrongful act, it must appear that he ratified such act with a full knowledge of its tortious character; and the mere appropriation of the fruits of the trespass, without such knowledge, is not sufficient. *Ib.* 271.
3. *Principal and agent; ratification by principal of agent's act.*—Where the relation of agency exists, and the principal derives a benefit from an act done by the agent beyond the scope of the agency, he will be held to have ratified such unauthorized act by *acquiescence*, if, after being fully informed of what has been done, he fails to ex-

AGENCY—*Continued.*

press his dissatisfaction within a reasonable time; but where the relation of agency does not exist when the act is done, but the act is that of a mere volunteer awaiting ratification, the silence of the principal will not be so readily construed into a ratification, except, perhaps, in cases where it might operate to the prejudice of innocent parties. *Ib.* 271.

4. *Same; declarations by principal to agent, verbal acts and competent.* The declarations of the principal, when first informed of the seizure of the goods by his agent, ordering them to be returned to the plaintiff, and his message to his acting agent, instructing him to have nothing more to do with the goods, are in the nature of verbal acts, tending to show a repudiation of the agent's act, and are competent evidence for the principal in a suit against him and the agent for trespass growing out of such seizure. *Ib.* 271.
5. *Same; ratification by principal of agent's trespass.*—If the principal, in good faith, and by suitable acts and declarations, repudiated the seizure of goods made by his agent under, and in execution of a power of sale contained in a mortgage executed by the plaintiff to the principal, the law would not make it incumbent on him to actively interfere to compel restoration of the goods to the plaintiff, unless they had come into his custody, or under his control. His failure, however, to counsel restoration, or to re-assert control over the mortgage under which the seizure was made, if satisfactorily proved, may be looked to by the jury, as tending to prove acquiescence. *Ib.* 271.
6. *Same.*—In all cases of trespass by an agent, for which the principal is sought to be held liable on the ground of a subsequent ratification by him of the agent's act, the law requires, with good reason, "substantial proof of the ratification." *Ib.* 271.
7. *Same; malice of agent as affecting damages against principal.*—The rule is, that where several defendants are sued in tort for damages, the malice or other evil motive of one can not be matter of aggravation, or ground of vindictive damages against the other; and hence, principals are not generally held liable for such damages by reason of the evil motive of the agent, unless the act of the agent was fully ratified with a knowledge of its malicious, aggravating, or grossly negligent character; or these matters of aggravation were probably consequent on the doing of the wrongful act ordered by the principal; or unless the agent was employed with a knowledge of his incompetency. *Ib.* 271.
8. *Evidence; when letter by agent is admissible in action of trespass against principal and agent.*—In an action of trespass against principal and agent, for the seizure by the agent of plaintiff's goods, a letter written by the agent two days before the seizure, directed to the plaintiff, and received by him in due course of mail, and endorsements made on the envelope by the agent, evincing an unfriendly feeling towards the plaintiff, are relevant and competent, on proof of handwriting, as tending to show malice or an evil motive on the part of the agent, which may have entered into, or given color to the transaction. *Ib.* 271.
9. *Trespass against principal and agent; when evidence of malice inadmissible.*—In trespass against principal and agent, founded on the seizure by the agent of goods of the plaintiff under a mortgage to the principal, where it is sought to charge the latter by reason of a subsequent ratification of the agent's act, the fact that the principal commenced a criminal prosecution against the plaintiff about the time of the seizure, is not competent evidence for the plaintiff, in the absence of all evidence tending to show the principal's original participation in the agent's act, or that he originally authorized it, although such fact may tend to show malice against the plain-

AGENCY.—*Continued.*

- tiff on the part of the principal. In such case, the prosecution is not a part of, or connected with the transaction alleged to have been ratified, and the malice, standing alone, is not competent to authorize the inference, that the principal conferred an original or previous authority upon the agent to make the seizure. *Ib.* 271.
10. *Ratification by principal of agent's trespass ; admissibility of evidence.* In an action of trespass by a mortgagor against a mortgagee, founded on the unauthorized wrongful seizure and asportation of the mortgaged property by the defendant's agent, a letter written by the plaintiff to the defendant, and delivered to him, giving an account of the manner in which the property was seized and carried away, and demanding its return, is competent evidence for the plaintiff for the purpose of proving a ratification by the defendant of his agent's act, when it is shown that the letter contained a correct version of the alleged trespass, and its contents are presumptively shown to have been known to the defendant. But the letter itself should be produced, or a proper predicate laid for secondary evidence of its contents. *Street v. Sinclair*, 110.
 11. *When lessee not the agent of the lessor.*—Where a lessee is authorized, by the terms of the lease, to erect improvements on the rented premises on his own credit and at his own expense, which are to become the property of the lessor at the termination of the lease, the value thereof to be paid by him in money, or be deducted from rent then due, this does not constitute the lessee the agent of the lessor for the erection of such improvements, nor does it impose on the lessor the duty or obligation to pay therefor. *Rothe v. Beltingrath*, 55.
 12. *Instructions by principal to agent to buy farm products ; presumption in reference to ; act and declaration of agent as evidence against principal.*—Where an agent is instructed to buy for his principal farm products, trading in which between sunset and sunrise is prohibited, the law presumes, in the absence of proof to the contrary, that the instructions were to buy at a time not prohibited by the statute ; and hence, on the trial of the principal, indicted for the act of the agent in buying at a time covered by the statutory prohibition, the fact of the purchase, and the declaration of the agent at the time it was made, that he was buying for the defendant, are inadmissible against him, "without bringing home to him the criminal design of the agent." *Russell v. State*, 348.

See COMMON CARRIER, 11-14.

HUSBAND AND WIFE.

AMENDMENTS.

1. *Only limitation upon right of, stated.*—The only limitations upon the right of a plaintiff in a civil action at law to amend the complaint, at any time before the cause is finally submitted to the jury and they have retired, are, that the form of action must not be changed, there must not be an entire change of parties, and there can not be the substitution or introduction of an entirely new cause of action. *Mahan v. Smitherman*, 563.
2. *When common counts may be added to special count in assumpsit.* The common counts may be added by amendment to a special count in *assumpsit*, when they are not intended to introduce a new cause of action, but merely as declaring on the cause of action declared on in the special count, only varying the form of the defendant's liability, and when a necessity therefor is disclosed. *Ib.* 563.
3. *When common counts can not be added.*—But if the common counts are intended to represent distinct and separate causes of action

AMENDMENTS—*Continued.*

from that declared on in the special count, their introduction by amendment would be the substitution or introduction of a new, distinct, independent cause of action, and would not be allowable. *Ib.* 563.

4. *Same.*—The refusal of the primary court to allow an amendment of a complaint declaring on a promissory note, by adding the common counts, is free from error, when there is nothing in the record to authorize the presumption that the common counts were not intended to present a different cause of action from that declared on in the original complaint. *Ib.* 563.
5. *Amendment by adding parties defendant; when not allowed.*—The statute authorizing an amendment of the complaint, by striking out or adding parties plaintiff or defendant (Code, § 3156), can not be construed so as to authorize the addition of parties defendant, who were not liable to be sued when the action was commenced, although they may have afterwards rendered themselves liable to the same action. *Burns v. Campbell*, 271.

See AGENCY, 1.

APPEAL.

See ERROR AND APPEAL.

ASSAULT AND BATTERY.

See CRIMINAL LAW.

TRESPASS.

ASSIGNMENT, GENERAL.

1. *When fraudulent deed of trust can not be declared a general assignment.*—A deed of trust, made with the intent to hinder, delay or defraud the grantor's creditors, can not be upheld and declared a general assignment, at the suit of creditors not secured thereby against other unsecured creditors who have caused attachments to be levied on the property conveyed by the deed, or who have attacked the deed for fraud. *Com'l Bank of Selma v. Brewer*, 574.

ATTACHMENT.

1. *Authority to issue must be specially conferred.*—Attachments are extraordinary process, unknown to the common law, not issuing out of a court, not pertaining to the exercise of the ordinary powers and jurisdiction of a court; and no one has the power to issue them, unless he is thereunto specially authorized. *Vann & Waugh v. Adams, Thorne & Co.*, 475.
2. *Attachments returnable to circuit or city courts; notaries public, with jurisdiction of justices of the peace, have no power to issue.*—Notaries public appointed by the Governor to "have and exercise the same jurisdiction as justices of the peace," have no power or authority to issue original attachments, returnable to the city or circuit courts; and hence, such attachment, thus issued, is void. *Ib.* 475.
3. *A personal proceeding.*—A suit commenced by attachment is not a proceeding *in rem*, but is personal against the defendant; and the judgment therein authorized is not merely one of condemnation of the property attached, but is personal and general, as in a suit commenced by summons and complaint. *Betancourt v. Eberlin, Adm'r*, 461.
4. *Notice essential to judicial proceedings operating upon parties personally.*—While notice is an essential element of all judicial pro-

ATTACHMENT—*Continued.*

ceedings which are to operate upon parties personally, and can not be dispensed with by legislative enactment, such notice need not be personal; it is enough, if it is fairly and reasonably probable that the notice prescribed by the legislature will apprise the party proceeded against of the pendency of the suit, and of the consequent necessity for his appearance to make defense, if he is unwilling to submit to judgment. *Ib.* 461.

5. *Statutes authorizing judgments in attachment suits without personal notice valid.*—Hence, the statutes of this State, as they formerly existed, authorizing personal judgments against defendants in suits commenced by attachment, without other notice than the levy of the attachment on the property or effects of the defendant gave, were consistent with the constitution; and judgments rendered therein, as between citizens of, and as to property found in, this State, were of the same force and effect, when drawn in question collaterally, as if they had been rendered on personal service. *Ib.* 461.
6. *Levy of attachment by service of garnishment; effect of; irregularities in garnishment can not affect validity of judgment.*—In attachment jurisdiction may be acquired by service of garnishment on defendant's debtor, which will be as full and complete as could have been acquired by a levy of the attachment on real estate, or on visible, tangible chattels, capable of manual seizure; and the garnishment being merely incidental and auxiliary to the attachment, errors intervening therein can not affect the validity of the judgment rendered against the defendant. *Ib.* 461.
7. *Complaint in attachment suit; evidence of filing.*—While the endorsement of the fact of filing a complaint in an attachment suit by the clerk is conclusive evidence that it was filed, at any time after judgment, it is not, either before or after judgment, the exclusive evidence of that fact; but when the complaint is found with the original file of the papers in the cause, from which it must be transcribed when the final record is made up, forming part of it, and there is no countervailing proof, the fact of filing is satisfactorily shown. *Ib.* 461.
8. *Attachment by landlord against tenant; when may be levied on crop of under-tenant.*—An attachment sued out by a landlord for the recovery of rent, the mandate of which runs merely against the crops of the tenant in chief, authorizes a levy of the writ, not only on the crops of the tenant in chief, but also on the crops raised on the rented premises by an under-tenant. *Agee v. Mayer Bros.*, 88.
9. *Notary public with justice's jurisdiction; power to issue attachments returnable before himself.*—A notary public with the jurisdiction of a justice of the peace has authority to issue an attachment returnable before himself for the collection of a demand within a justice's jurisdiction. *Rice & Wilson v. Watts*, 593.

ATTORNEY-AT-LAW.

See AUDITOR.

AUDITOR.

1. *Books and documents of public office; right of inspection.*—While the books and documents of a public office are the property of the public, and are preserved for public uses and purposes, it is not the unqualified right of every citizen to demand access to, and inspection of them; but, to entitle one to an inspection of such books and documents, other than judicial records, he must show that he has an interest therein, and desires an inspection thereof for a legitimate purpose. *Brewer v. Watson*, 299.

AUDITOR—*Continued.*

2. *Same; what is; right of attorney to inspect.*—The book kept by the Auditor of the State, in obedience to the requirement of the statute, for the purpose of entering the accounts of tax collectors with the State, is a public record; and an attorney-at-law, employed by an ex-tax collector to represent him on a settlement of his accounts with the Auditor, has an interest which entitles him to an inspection of the accounts of his client as entered in such book. *Ib.* 299.
3. *Same; when Auditor may demand evidence of attorney's authority.* But the Auditor may demand of the attorney satisfactory evidence of his authority to represent the tax collector, and may, if he fail or refuse to furnish it, decline to allow an inspection of the accounts by him. In such case, the presumption of authority obtaining in courts, arising from the attorney's license, and from the fact that he is an officer of court, can not be claimed. *Ib.* 299.
4. *When witness can not testify to his belief.*—In an action against the Auditor by an attorney, to recover damages alleged to have been suffered by the attorney on account of the Auditor's refusal to allow him to inspect the records in the latter's office, in which were kept the accounts between the State and certain tax collectors represented by the attorney, it is not permissible for either the defendant or his clerk to testify to the *belief* either may have had as to plaintiff's employment, or as to his authority to represent the tax collectors. If such belief were a material fact in the case, it is an inference to be drawn by the jury from the circumstances which may be in evidence. *Ib.* 299.
5. *Inspection of public documents in Auditor's office; when right to not forfeited.*—The inspection of public documents can not be denied merely on the ground that the party applying for it has been guilty of some past impropriety of conduct as to matters to which some documents may refer, nor because it is apprehended that the information obtained will be employed in litigation with the State; and hence, in an action by an attorney, founded on the Auditor's refusal to allow him to inspect the accounts of tax collectors whom he represented, as entered on books in the Auditor's office, the fact that the attorney had previously availed himself of his knowledge of the contents of the books in the office, however derived, to interfere with negotiations the Auditor was conducting with others, can not deprive his clients, or him as their representative, of the right to examine into their accounts. *Ib.* 299.
6. *Same; when reason for refusal to allow inspection, admissible to negative malice.*—Although such fact may not have been relevant as establishing a justification of the refusal, yet, the complaint averring that the refusal was malicious and with the intent to injure the plaintiff, it was admissible for the purpose of rebutting or negating malice, it having a fair and reasonable tendency to show that the defendant acted from a good motive and in good faith. *Ib.* 299.
7. *When information on which a party acts admissible in evidence.*—In such case, information of the attorney's interference with the Auditor's negotiations for settlements with others than the attorney's clients, although derived from correspondence or verbal communication with such other parties, is competent evidence for the Auditor; as the specific fact to be shown was not the truth of the information, but the fact of its communication to the Auditor, and that he acted upon it in denying the attorney access to the books of his office. *Ib.* 299.
8. *Good faith in action for exemplary damages; effect of.*—The good faith of the Auditor, in such case, in refusing the inspection may relieve him from the imputation of malice, and acquit him of liability for vindictive or exemplary damages; but it can not relieve him of liability for actual or compensatory damages. *Ib.* 299.

BAILMENT.

See COMMON CARRIER.

WAREHOUSEMAN.

BANKRUPTCY.

1. *Effect of, on bankrupt's property.*—A bankrupt, by the adjudication of bankruptcy, becomes incapable of enforcing, in his own name, any property rights which belonged to him at the time of the adjudication; but upon the appointment of an assignee by the bankrupt court, and the execution and delivery of an assignment to him, all the property rights of the bankrupt, except such as were specially excepted from the operation of the bankrupt act, vest in the assignee, with the exclusive right to sue for the same. *Gayle v. Randall*, 469.
2. *Effect of, on husband's right to sue for rents of lands belonging to the wife's statutory separate estate.*—While rents of lands belonging to the wife, as her statutory separate estate, and received by the husband during coverture, are held by him in trust, and are not affected by his bankruptcy; yet, the death of the wife, intestate, terminating the trust, and creating, under the statute, a new right in the husband, rents of such lands, accruing thereafter, become the absolute property of the husband, and the right to collect them passes to his assignee in bankruptcy. *Ib.*, 469.
3. *Right of bankrupt to exemption of personal property can not be asserted in State court.*—A claim of exemption to personal property by a bankrupt must be asserted in the court of bankruptcy; and if not asserted and allowed by that court, it can not be afterwards asserted in a State court. *Ib.* 469.

BANKS.

See NATIONAL BANKS.

BILL OF EXCEPTIONS.

1. *Mandamus; as a remedy in reference to.*—If it be conceded that *mandamus* is an appropriate remedy to compel the judge of an inferior court to insert in a bill of exceptions a statement which he has stricken therefrom as untrue in point of fact, or as immaterial, or as inappropriate, the truth of such statement, and a necessity for its introduction into the bill must be affirmatively shown, before it can be pronounced that there is a legal right to its insertion. *Ex parte Huckabee*, 427.
2. *Refusal of primary court to charge as requested; when may be revised.* The refusal of the primary court to charge as requested, can and will be revised, on proper exception, if it is shown by the bill of exceptions that the instructions were not abstract, or that they were not addressed to the sufficiency of the evidence; and this can be shown without a recital of all the evidence which may have been introduced on the trial. *Ib.* 427.
3. *Mandamus; when will not lie to compel circuit judge to insert clause in bill of exceptions stricken out by him.*—Where exceptions were reserved to the refusal by the court of instructions to the jury, requested by the excepting party, and the judge of the circuit court struck from the bill of exceptions, as prepared and presented to him, the words, "this being all the evidence in the case," an application for a *mandamus* to compel the judge to insert in the bill the words so stricken out, which fails to show that the bill of exceptions, without these words, does not show that the instructions were not abstract, or that the insertion of the words is necessary to show that the instructions were not abstract, fails to show a right to the insertion, and will be denied. *Ib.* 427.

BONDS.

See JUSTICE OF THE PEACE.

BURGLARY.

See CRIMINAL LAW.

CARRYING CONCEALED WEAPON.

See CRIMINAL LAW.

CHANCERY.

1. *Bill by minority of stockholders against corporation and directors.*
A bill filed by a minority of the stockholders in a private corporation against the corporation and a majority of the directors, seeking to hold them accountable for a mismanagement of the corporate trusts, charging the directors with a combination and formation of a ring for their own private profit at the expense of the other stockholders, and with acts of wrong-doing and mismanagement, none of which are *ultra vires*, but containing no averment that the corporate effects are imperiled by the insolvency of the parties, or that any request has been made known, soliciting the use of the corporate name in bringing suit against the offending directors, or that any attempt has been made to obtain a meeting of the stockholders for the purpose of obtaining redress of the alleged grievances,—is without equity. *Merchants & Planters Line v. Waganer*, 581.
2. *When regularity of incorporation can not be questioned.*—On such bill, no inquiry can be made as to irregularities in the organization of the defendant corporation, organized under the general law, for the purpose of showing that, by reason of a failure to take some of the preliminary steps required by the statute, there was no proper incorporation. *Ib.* 581.
3. *Bill by stockholders against corporation; when not multifarious.*—A bill filed by a minority of the stockholders of a private corporation, seeking a dissolution of the corporation, and a settlement of its affairs, is not multifarious, because the complainants are not entitled to joint or co-extensive relief. They are entitled to relief of the same kind; and, in taking the account, complete adjustment should be made among all the parties, plaintiff and defendant. *Ib.* 581.
4. *Bill by married woman out of possession, to have cancelled conveyance of her statutory separate estate; when contains equity.*—Where a married woman joined her husband in the execution of a deed of trust conveying lands belonging to her, as her statutory separate estate, to secure her husband's debt, and afterwards, under an agreement of compromise and settlement of the debt and the asserted liability of the lands for the payment thereof, she and her husband executed an absolute deed, reciting the agreement of compromise and settlement, and conveying to the creditor a portion of the lands covered by the deed of trust, and the evidence of the debt was given up to the husband, and the deed of trust cancelled; and afterwards the creditor sold and conveyed the lands conveyed by the last deed to another, who took possession, claiming title under the deed,—*held*, that the wife could maintain a bill in equity against the creditor and purchaser from him, to have the deed, executed by herself and husband under the agreement of compromise and settlement, cancelled, although she was out of, and the purchaser in possession of the lands. (*Boyleston v. Farrior*, 64 Ala. 564, re-affirmed and followed.) *Ryall v. Prince*, 66.
5. *Same; rents can not be recovered.*—In such suit rents can not be re-

CHANCERY—*Continued.*

- covered by the wife, as they are payable under the statute to the husband. (BRICKELL, C. J., *dissenting.*) *Ib.* 66.
6. *Administration of estates; jurisdiction of court of equity.*—Before the jurisdiction of the court of probate to settle an administration, and to make division and distribution, has been put in exercise, devisees or heirs, legatees or distributees may, without assigning any special cause, resort to a court of equity for a settlement of the administration, the payment of legacies, the distribution of personal assets, and the division of lands devised or descended. *Bragg, Adm'r v. Beers, 151.*
 7. *Sale of lands for partition; when court of equity will take jurisdiction.* While a court of equity, in the absence of a statute conferring the jurisdiction, will not decree a sale of lands held and owned jointly by adults without the consent of all of them, on a bill filed for that purpose alone; yet, when the court takes jurisdiction of a decedent's estate, and to effect a final settlement, distribution and partition, a sale of lands is necessary, it will order the sale in all cases in which, under like circumstances, the court of probate would have had jurisdiction to order it. *Ib.* 151.
 8. *Bill in equity; necessary parties.*—To a bill filed by a devisee and legatee for a settlement of his testator's estate, a sale of the lands devised for partition, and distribution of personal assets, mortgagees of the undivided interests of other devisees in the lands are necessary parties. *Ib.* 151:
 9. *Bill by administrator against parties who have converted personal assets of estate; when without equity.*—An administrator has a plain and adequate remedy at law against parties who have taken, received or interfered with moneys and other personal assets belonging to his intestate's estate; and hence, a bill filed by an administrator against such parties, seeking to charge them as executors *de son tort*, or as trustees *in invitum*, is without equity. *Abernathy, Adm'r v. Bankhead, 190.*
 10. *Same; when can not be maintained to prevent multiplicity of suits.* The jurisdiction of a court of equity can not be maintained in such case on the ground of preventing a multiplicity of suits, where only three persons participated in the wrong complained of, and only three suits at law are necessary to an enforcement of complainant's rights. *Ib.* 190.
 11. *Exemption in favor of widow; power of probate court to determine contest in reference to.*—The powers of the probate court are fully adequate for the settlement of a contest or dispute between a personal representative of a decedent's estate and his widow as to exemptions of personal property claimed by her; and a court of equity will not take jurisdiction in such case, unless some particular reasons for its intervention are shown. *Ib.* 190.
 12. *When trust in favor of the wife will be established in lands purchased by, and conveyed to the husband; protection to bona fide purchaser.* A court of equity will establish a trust in favor of a married woman in lands purchased by the husband with moneys belonging to her statutory separate estate, and conveyed to him, when the facts, out of which the trust arises, are averred with distinctness and precision, and, if denied or not admitted, are shown by clear, full and convincing evidence; but against such a trust a mortgagee of the husband, who stands in the position of a *bona fide* purchaser for value, and without notice of the wife's equity, is entitled to protection. *Mobile Life Ins. Co. v. Randall, 220.*
 13. *When a mortgagee is a purchaser for value.*—A creditor, who accepts from his debtor a note payable at twelve months, for a debt past due, thereby releasing parties who were sureties on the debt, and also takes a mortgage on land to secure the note, is a purchaser

CHANCERY—*Continued.*

- for value, and, as such, is entitled to protection against a trust in favor of the debtor's wife, resulting from the fact that the land was purchased with moneys belonging to her as her statutory separate estate, of which the creditor had no notice. *Ib.* 220.
14. *Conveyance of lands void for actual fraud; grantee chargeable with rents.*—In cases of actual fraud a fraudulent grantee must be considered as a trustee of the rents and profits, as well as of the *corpus*, of the property conveyed, and as holding them in the right, and for the benefit of attacking creditors; and hence, where a conveyance of land has been declared void for actual fraud, on bill filed by creditors of the grantor, the grantee is chargeable with rents. (*Marshall v. Croom*, 60 Ala. 121, overruled on this point.) *Kitchell, Adm'r v. Jackson*, 556.
 15. *Same; from what time rents to be estimated.*—But the rents or profits in such case should only be allowed from the service of the summons on the grantee, as that, strictly speaking, is the true time of the demand on him therefor. *Ib.* 556.
 16. *Costs in chancery; taxing of, discretionary.*—In equity the taxing of costs is a matter within the wise and just discretion of the chancellor, and is not revisable in this court. *Ib.* 556.
 17. *Bill in equity by sureties on administrator's bond to enjoin collection of decrees in probate court, and to establish equitable set-offs; when without equity; necessary parties defendant; misjoinder of parties complainant.*—On the death of M., intestate, his widow and another qualified as administrators of his estate by executing, with sureties, a joint bond. Afterwards the widow died intestate, without making settlement of her administration; and after her death the surviving administrator executed, with sureties, an additional bond, and thereafter made a final settlement of his administration, on which decrees were rendered against him in favor of the widow's administrator and in favor of the guardian of J. and F., who were the only heirs of M. and also of the widow, each for one-third of the balance ascertained to be due from him. This balance resulted from a *devastavit* committed during the joint administration. The decree in favor of the widow's administrator was paid to him, and by him distributed equally between J. and F. After the rendition of these decrees F. died intestate, free from debt, and leaving J. as her only heir. No executions having been issued on the decrees within twelve months from the date of their rendition, J. and the personal representative of F. separately moved to revive; and thereupon the decree in favor of J. was revived only for a small balance, the court crediting it with \$1,000, as paid by the administrator of M. by the conveyance of land to the common guardian of J. and F.; but, on appeal to this court, the order of the Probate Court was reversed, this court holding that only one-half of said amount should be credited on J.'s decree, and that the balance should have been credited on the decree in favor of F. The decree in favor of F. was revived for its full amount, less \$100, paid thereon; but, after return of execution against M.'s administrator "no property found," an execution was issued against the sureties on both bonds for the full amount of the decree. *Held*, on a bill filed by the sureties on both bonds to enjoin the proceedings in the Probate Court, to have said decrees credited with the \$100, and also with the \$1,000 paid thereon, and to have an account stated of the amount of the *devastavit* committed by the widow during said joint administration, and such amount set off against said decrees,
 1. That if the complainants were not concluded by the failure of the administrator of M. to set up the defense of payment, they had a plain and adequate remedy by *supersedeas* in the Probate Court, and for this reason their bill is without equity.

CHANCERY—*Continued.*

2. That if such a bill could be maintained, the personal representative of M.'s widow would be a necessary party.—*Larkin v. Mason*, 227.
18. *Construction of Contract.*—S. & H., being seized and possessed of a tract of land, entered into a contract with B., by which they agreed to sell to B. the said tract of land, and to convey the same to him on payment of the purchase-money; B. agreeing to pay a stated amount in cash, to give his promissory notes for the balance, payable respectively on the first days of January, 1877, 1878 and 1879, and to execute to S. & H. a mortgage on the crops of cotton to be grown by him on said land during the years 1877, 1878 and 1879, as security for the payment of said notes, and to ship all of said crops of cotton to them, to be by them sold and the proceeds applied to the extinguishment of such of said notes as might be then unpaid. On the same day S. & H. executed to B. a bond, conditioned to convey the land upon the full payment of the purchase-money therefor; and B. made the cash payment, gave his notes as agreed on, and executed to S. & H. a mortgage on said cotton crops, reciting that it was executed to "more effectually secure the payment of said promissory notes as they respectively mature;" providing that, upon payment of the notes at maturity, the mortgage should become void, and containing a power of sale on default in the payment of the notes, or either of them, the proceeds of sale, after paying the expenses of the sale, to be applied to any balance that might be then due and unpaid on the notes. These notes B. paid at or before their maturity, but shipped no cotton to S. & H. *Held*, on bill filed by B. for a specific performance of the contract of sale,
1. That the contract of sale, the bond for title and the mortgage, having been executed on the same day, by and between the same parties, and relating to the same subject-matter, must be construed together as one and the same transaction.
 2. That the agreement to execute the mortgage and the mortgage as executed were intended as additional security for the payment of the notes, and the stipulation for the delivery of the cotton was only inserted for the purpose of making the security more certainly available; that the payment of the notes at maturity was a compliance with the agreement and a satisfaction of the mortgage, and that B. was entitled to a specific performance of the contract.—*Sims v. Knight*, 197.
19. *Jurisdiction of courts over lands in another State.*—As to lands situate in another State, the courts of this State can exercise no jurisdiction *in rem*, or affecting the *res*; but if title or power affecting such lands was obtained by duress or fraud, upon proper averments, a personal decree may be had, vacating such title or power; or if such lands have been converted into money, or money has been realized from them, by one acting under a fraudulent title or power, he can be compelled to account, either in law or in equity, as the nature of the accounts, or the character of the relief may require. *Rose v. Gibson*, 35.
20. *Decree sustaining demurrer not final.*—A decree which simply sustains a demurrer, without further order disposing of the cause, is not a final decree. *Ib.* 35.
21. *Parol contract for sale of lands; rule as to proof of part performance to take it out of the statute of frauds.*—To take a parol contract for the sale of lands out of the statute of frauds by part performance, and to obtain a specific performance thereof, the contract must be clearly proved, and the acts relied on as a part performance "should be so clear, certain and definite in their object and design, as to re-

CHANCERY—Continued.

- fer exclusively to a complete and perfect agreement, of which they are a part execution." *Pike v. Pettus*, 98.
22. *Same*; when specific performance will not be decreed.—When the testimony in reference to the contract is so conflicting that it can not be said to be "clearly proved;" or when the acts relied on as a part performance are of an equivocal nature, being such as might have been done with other views than in part execution of the agreement, a court of equity will not enforce a specific performance of the contract, or grant relief depending on the existence of the contract and its validity. *Ib.* 98.
23. *Bill to foreclose; subsequent purchaser proper party*.—An administrator having executed a mortgage on lands to indemnify the sureties on his official bond, reserving possession to himself until his liability should be judicially ascertained, a subsequent purchaser under execution against the administrator, prior to the settlement of his administration, holds in subordination to the rights of the sureties under the mortgage; and one of the sureties, having paid the decree rendered against them and their principal on settlement of his administration in a court of equity, may maintain a bill to foreclose the mortgage against the mortgagor and the purchaser at execution sale, the latter having recovered possession by action at law against the mortgagor. *Tutwiler v. Dunlap*, 126.
24. *Bill to foreclose mortgage executed by administrator to indemnify surety; averment of administrator's default*.—The bill in such case must show, by appropriate averments, that the administrator was in default; and averments of the filing of the bill in the administration suit, and of the proceedings had, and decree rendered therein, are insufficient as against the purchaser, who was not a party to that suit. *Ib.* 126.
25. *Effect of decree as evidence*.—The decree rendered in the administration suit does not conclude the purchaser, and is competent evidence against him in the foreclosure suit merely to prove the fact of its rendition, and amount; it is not competent evidence, as against him, of the liability or default of the administrator. *Ib.* 126.
26. *Cross-bill; when can not be maintained*.—In a suit for the foreclosure of such mortgage, the mortgagor can not maintain a cross-bill to have the execution and levy under which the purchaser bought, declared void. Such claim is purely a legal demand between the mortgagor and the purchaser, a co-defendant, in which the complainant, the mortgagee, has no concern whatever, and is not the proper subject for a cross-bill. *Ib.* 126.
27. *Redemption of lands by mortgagor; within what time allowed*.—An offer by a mortgagor to redeem lands sold under a power of sale contained in the mortgage, whether made by bill or otherwise, must be made within two years from the date of sale, unless the mortgagee was the purchaser; in that event a bill to set aside the sale and to redeem may be filed within a reasonable time, to be determined by the circumstances of each particular case. *Cooper v. Hornsby*, 62.
28. *Bill in equity by creditor to set aside voluntary conveyance; when adverse possession for ten years by grantee a bar*.—Adverse possession for ten years by a grantee in a voluntary conveyance of land, executed while the grantor was surety on a guardian's bond, is, under the statute of limitations, a good defense to a bill filed by an administrator of the deceased ward, to have the conveyance set aside as fraudulent, and the land subjected to the payment of the guardian's liability to his ward. *Snedecor, Adm'r v. Watkins*, 48.
29. *Same*.—As the purpose of the proceedings in such case is not to obtain a personal judgment on the debt or liability, or to recover the

CHANCERY—*Continued.*

- land, but to have the grantee declared a trustee *in invitum*, it is immaterial that the right of the complainant to proceed against the surety of the guardian arose within ten years prior to the commencement of the suit. *Ib.* 48.
30. *Decree in equity rendered in vacation; when valid.*—Under Rule 77 of Chancery Practice, as found in the Revised Code, and which is brought forward into the Code of 1876, as Rule 80, a decree of a court of equity, rendered in vacation, on 13th September, 1877, is valid. *Hooper, Adm'r v. Strahan*, 75.
 31. *Section 3036 of the Code of 1876 applicable to suits in equity.*—Section 3036 of the Code of 1876, providing that all written instruments, the foundation of the suit, purporting to be signed by the defendant, etc., must be received in evidence, without proof of the execution, unless the execution thereof is denied by plea verified by affidavit, manifestly applies as well to courts of equity as to courts of law. *Ib.* 75.
 32. *Defense of bona fide purchaser for value without notice, to bill to enforce vendor's lien; what answer must aver.*—A defendant to a bill in equity filed to enforce a vendor's lien, who is a sub-purchaser, and defends on the ground that he is a *bona fide* purchaser for value and without notice, must aver in his plea or answer clearly, distinctly and without equivocation, (1) that he is a purchaser from one in actual or constructive possession, who was seized or claimed to be seized of the legal title, at the same time setting out substantially the contents of the deed of purchase, with date, consideration and parties; (2) that he purchased in good faith; (3) that he parted with value by paying money or other valuable thing, assuming a liability, or incurring an injury, stating the nature of the consideration fully; and (4) that he had no notice of complainant's equity, and knew no fact calculated to put him on inquiry, either at the time of the purchase, or at or before the time he parted with the consideration. *Ib.* 75.
 33. *Same; when answer insufficient.*—Tested by the foregoing requirements, the answers of defendants in this case, who were sub-purchasers, and claimed that they were *bona fide* purchasers for value and without notice, are held to be insufficient. *Ib.* 75.
 34. *Allegations and proof must correspond.*—In such case, proof without allegations will not entitle the defendants to the benefit of their defense. *Ib.* 75.
 35. *Executory contracts of infants; may be avoided without tendering back what was received under the contract.*—If an infant, on becoming of age, disaffirms an *executory* contract, the adult purchaser or contractor being then forced to become the actor, to have the contract performed, the *quondam* infant is under no conditions or limitations in asserting the invalidity of the contract; the contract being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by the proof, will prevail, without his tendering back anything he may have acquired or received under the contract. *Eureka Co. v. Edwards*, 248.
 36. *Executed contracts of infants; when tender essential to relief in equity.* But if the contract, as in this case, is executed, the rule in equity is different. Then the *quondam* infant, or any one asserting claim in his right, must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be decreed him; and hence, if the money or other valuable thing received by the infant be still *in esse*, and in the possession of the infant or of the party seeking relief in his right, a bill seeking to avoid the contract need not tender, or offer to produce or pay, as the case may be. *Ib.* 248.
 37. *Same; when tender not required.*—Where, however, as in this case,

CHANCERY—*Continued.*

- the infant executed a deed to lands sold by him, and received and consumed the purchase-money during his infancy, a bill averring this fact, filed by one claiming the land under a deed executed by the infant, after he had attained his majority, to have the first deed cancelled as a cloud upon his title, need not tender back the purchase-money received by the infant. *Ib.* 248.
38. *First point decided in Martin v. Martin, 35 Ala. 560, held unsound.* The first principle decided in *Martin v. Martin, 35 Ala. 560* is not supported by the authorities cited, or by principle. *Ib.* 248.
39. *When notice of deed of infant, which he had disaffirmed, by a purchaser from infant after he had attained his majority, immaterial.* Where an infant, for a valuable consideration, which he received and used during his minority, executed a deed to lands, and disaffirmed it, and sold and conveyed the lands to another, after he became of age, the disaffirmance of the first deed destroyed all the claim, both legal and equitable, vested in the grantee thereunder, and left in him no pretense of any equity to assert against the later purchaser; and hence, the fact that such purchaser had notice of the first deed was immaterial. *Ib.* 248.
40. *When notice material.*—It is only when there is a prior right, legal or equitable, that notice, actual or constructive, becomes material to intercept or dominate an after acquired title. *Ib.* 248.
41. *Decree dismissing bill; when conclusive.*—The decree of a court of chancery dismissing absolutely and unconditionally a bill filed by two heirs against the administrator of their intestate's estate, seeking to compel him to make a settlement and distribution of the estate, rendered on the hearing, on pleadings and proof, is an adjudication of the merits of the cause against them, and constitutes a bar to a subsequent bill filed by the survivor of them, one having died, seeking the same relief, although such decree was founded on an erroneous decision as to the validity of certain decrees rendered by the probate court in which the administration of the estate was pending, and set up in defense of the suit by the administrator. *Tankersly, Adm'r v. Pettis, 179.*
42. *Former adjudication; what issues covered thereby.*—When there is no question as to the jurisdiction of the court, or as to the identity of the parties, the inquiry, whether the subject-matter of the controversy has been drawn in question and is concluded by a former adjudication, is determined, when it is ascertained that the matters of the two suits are the same, and the issues in the former suit were broad enough to have comprehended all that is involved in the second suit. *Ib.* 179.
43. *Decree dismissing bill on the merits; effect of can not be avoided by showing that bill was unskillfully drawn.*—The force and effect of a decree of a court of equity dismissing a bill on the merits, can not be obviated by the complainant invoking his negligence or unskillfulness in pleading. *Ib.* 179.
44. *When plea of res adjudicata not sustained by the proof.*—The testimony introduced in support of a plea of *res adjudicata*, interposed as a defense to the bill in this case, is held to be "entirely too meagre to show that the same matters were in issue, and a final decree pronounced on their sufficiency as a ground of relief. *Robinson v. Pebworth, 240.*
45. *When party to bill in equity estopped from objecting, on appeal, to order granting rehearing.*—Where, after a rehearing was granted in a suit in equity on application of the defendants, the complainant, without objection, entered upon a second trial, he thereby impliedly consented for the court to pass judgment upon the merits; and he is, therefore, estopped from raising the objection, on appeal, that the order granting the rehearing was made in vacation, and did

CHANCERY—Continued.

- not come within the influence of the 80th Rule of Chancery Practice. *Johnson v. Bell*, 258.
46. *Decree of distribution of assets of estate between distributees; when free from error.*—On the principle that equality is equity, it was held that, under the facts of this case, the decree of the chancellor, making distribution of the assets of a decedent's estate among distributees, was free from error. *Ib.* 258.
 47. *Bill in equity; service on infant defendants; when erroneous.*—The mode for the service of summons to answer bills in equity issuing against infants, prescribed by the 23d Rule of Chancery Practice, is exclusive of all other modes; and hence, service on infant defendants personally, whose parents are living and not interested adversely to them, whether they are of tender years or have nearly attained their majority, is irregular; and the appointment of a guardian *ad litem* on such service is premature and erroneous. *Hibler v. Sprowl*, 50.
 48. *Same; when appointment of guardian ad litem erroneous under 26th rule of Chancery Practice.*—Where a bill in equity, to which infants were made parties defendant, and which was verified by affidavit, avers the fact of infancy, but omits to state whether the infants were over or under the age of fourteen years, and no affidavit was filed stating the fact, the appointment of a guardian *ad litem* for them in such case is violative of the 26th Rule of Chancery Practice, and will not support a decree against them. *Ib.* 50.

See ERROR AND APPEAL.

TRUSTS AND TRUSTEES.

VENDOR AND PURCHASER.

FRAUDULENT CONVEYANCE.

CHARGE TO JURY.

1. *Misleading charge given at request of party, not a reversible error.* While a charge requested, which, without explanation, has a tendency to mislead the jury, by diverting them from the consideration of material evidence, may be refused by the primary court without error, the giving of such a charge is not a reversible error; but, in such case, the party complaining should ask explanatory or additional instructions, to obviate its misleading tendency. *Ala. Gt. Sou. R. R. Co. v. Jones*, 487.
2. *When properly refused.*—A charge requested by a party which assumes the truth of the evidence on his behalf, thereby withdrawing from the jury all consideration as to the truth or falsity of other conflicting evidence, is properly refused. *Ford v. State*, 385.
3. *Same.*—A charge to the jury, requested by either party, which is involved and ambiguous, and has a tendency to mislead and confuse the jury, is properly refused. *Brewer v. Watson*, 299.
4. *Same.*—A charge which ignores an important feature of the evidence in a cause, and for that reason is misleading, is properly refused, although it may assert a correct proposition of law. *Savery v. Moore*, 236.
5. *Same.*—On the trial of a defendant under an indictment for gaming, containing one count, in which several averments are stated disjunctively, a charge requested by the defendant, instructing the jury, that "the testimony of the witness must be such as to establish the fact to a moral certainty, and beyond all reasonable doubt, that every allegation in the indictment is true," should not be given, although it asserts a legal truism, for the reason that its effect would be to refer to the jury to ascertain what were the allegations in the indictment. *Ayers v. State*, 11.

CHARGE TO JURY—*Continued.*

6. *When charge invasive of province of the jury.*—The jury are not compelled to find according to the mere preponderance of the evidence, unless it produces a reasonable conviction, or satisfaction of the mind; and hence, a charge instructing the jury that "if the weight of evidence is in favor of the plaintiff, he should recover," is an invasion of the province of the jury, and erroneous. *Street v. Sinclair*, 110.
7. *Defendant's statement; when charge upon weight of, erroneous.*—A charge requested by a defendant in a criminal case, embodying an instruction to the jury, that his statement "is to be given no less credence on account of its not being made under oath," being an improper infringement upon the province of the jury, was, for that reason, properly refused. *Blackburn v. State*, 319.
8. *When abstract charge error.*—Where the effect of an abstract charge, given by the court *ex mero motu*, though asserting a correct legal proposition, is, when considered in connection with the evidence, to mislead the jury, the giving of the charge is a reversible error. *Bernstein v. Humes*, 260.
9. *How given and how construed.*—Charges to the jury should be given in reference to the tendencies of the testimony, and should be construed in the light thereof. *S. & N. R. R. Co. v. Wood*, 215; *Alexander v. Alexander*, 295.
10. *When not erroneous.*—Where counsel, in the argument of the cause, urged upon the jury, that there was a conflict between the evidence of a named witness and that of the other witnesses in the cause,—*held*, that the court committed no error in referring to the argument in its charge to the jury, and in submitting for their consideration and determination, whether there was such conflict, and in referring to them the credibility of the witnesses, if such conflict did exist. *King v. State*, 1.
11. *When charge does not invade province of the jury.*—Upon exception to a sentence in the general charge of the court, wholly disconnected from the body of the charge, which is in these words: "Do you thus believe then that in this county and before the finding of the indictment in this case, the defendant killed John T. Franklin [the deceased]?" If so, then inquire, as I have stated, from the evidence, what the circumstances of the killing were, what was the situation of the parties to each other,"—*held*, that there was no invasion of the province of the jury—no assumption that any fact was proved, nor the withdrawal from the consideration of the jury of evidence tending to establish any fact.
12. *When charge is abstract.*—On the trial of a defendant indicted for murder, if there is no evidence tending to show that the killing was unintentional, though unlawful, a charge requested by the defendant instructing the jury, that the defendant might be found guilty of manslaughter in the second degree, although guiltless of a higher offense, is abstract and should be refused. *Ib.* 1.
13. *Same.*—In the absence of all evidence in such case having a tendency to show that at the time of the killing the defendant was in imminent peril of life or grievous bodily harm, or of the existence of circumstances creating in his mind a reasonable belief of such peril, a charge requested by the defendant embodying instructions on the law of self-defense, is abstract, and should be refused. *Ib.* 1.

CODE.

1. § 179. Liability of sureties on official bond for wrongful act committed under color of office. *Mason v. Crabtree*, 479.
2. § 375. State's lien for taxes. *Driggers v. Cassady*, 529.

CODE—Continued.

3. § 1699. Duty of railroad engineer as to blowing whistle, etc., at public crossing. *Ala. Gr't Sou. R. R. Co. v. McAlpine*, 545.
4. § 2121. Statute of frauds. *Cooper v. Hornsby*, 62; *Pike v. Pettus*, 98; *Horton v. Wollner*, *Hirshberg & Co.* 452.
5. §§ 2140-1. Sale of freight by common carrier. *Nathan Bros. v. Shivers*, 117.
6. § 2145. Execution of deed to land. *Allred v. Elliott*, 224.
7. § 2166. Registration of mortgage. *Pique, Manier & Hall v. Arendale*, 91.
8. § 2199. Parol trust in land void. *Rose v. Gibson*, 35; *Whaley v. Whaley*, 159.
9. § 2372. Administration of estates granted to sheriff. *Landford v. Dunklin et al. Adm'rs*, 594.
10. § 2520. Liability of administrator for interest. *Clark, Adm'r v. Hughes*, 163.
11. § 2521. Costs of contest of administrator's account. *Moody, Adm'r v. Hemphill*, 169.
12. § 2698. Divorce as affecting dower. *Williams, Adm'r v. Hale*, 83.
13. § 2710. Power of husband to receive wife's property. *Smith v. Whitfield*, 106.
14. §§ 2715-16. Widow's distributive share and dower as affected by separate estate. *Harris v. Harris*, 536.
15. § 2820. Exemptions. *State v. Allen*, 543; *McCrary v. Chase & Co.*, 540.
16. § 2827. Homestead exemption to widow. *Hatsfield v. Harvoley, Adm'r*, 231.
17. § 2834. Contest of exemption. *McCrary v. Chase & Co.* 540.
18. § 2840. Homestead exemption to widow. *Hatsfield v. Harvoley, Adm'r*, 231.
19. §§ 2877-9. Redemption of realty. *Harris v. Miller*, 26; *Cooper v. Hornsby*, 62.
20. § 2890. Suit on contract for delivery of property. *Ragland v. Wood*, 145.
21. § 2905. Promises in writing, joint and several. *Steed v. Barnhill*, 157.
22. § 2919. Recovery against one or more of several defendants. *Steed v. Barnhill*, 157.
23. § 2994. Set-off by surety. *Beard v. Union & Am. P. Co.*, 60.
24. §§ 3029-30. Trial of cause without a jury; special finding. *Betan-court v. Eberlin, Adm'r*, 461.
25. § 3058. Competency of parties as witnesses. *Dunlap, Adm'r v. Mobley, Adm'r*, 102; *Dudley, Adm'r v. Steele*, 423.
26. § 3104. Demurrer to evidence. *Curtis v. Daughdrill*, 590.
27. § 3156. Amendments. *Burns v. Campbell*, 271; *Mahan v. Smith-erman*, 563.
28. §§ 3161-72. Rehearing. *Renfro Bros. v. Merryman & Co.*, 195.
29. § 3227. Statute of limitations of five years. *Cooper v. Hornsby*, 62.
30. § 3240. Statute of limitations as affected by partial payments. *Royston v. May*, 398; *Curtis v. Daughdrill*, 590.
31. § 3290. Venue of trial of right of property. *Ex parte Dunlap*, 73.
32. § 3345. Venue of trial of right of property. *Ex parte Dunlap*, 73.
33. § 3395. Summary proceedings against county treasurer. *Cohen v. Coleman*, 496; *Boothe v. King*, 497.
34. §§ 3440 et seq. Mechanics' lien. *Rothe v. Bellingrath*, 55.
35. § 3467. Landlord's lien. *Agee v. Mayer Bros.*, 88.
36. §§ 3476-7. Enforcement of landlord's lien. *Agee v. Mayer Bros.*, 88.
37. §§ 3555 et seq. Erection of mill-dams. *Folmar v. Folmar*, 136.
38. § 3634. Certified statement of judgment before justice of the peace as evidence. *Burns v. Campbell*, 271.

CODE—*Continued.*

- 39. § 3704. Unlawful detainer. *Houston v. Farris & McCurdy*, 570.
- 40. § 3896. Decree in chancery rendered in vacation. *Hooper, Adm'r v. Strahan*, 75.
- 41. § 3945. Confession of judgment a release of errors. *McNeil v. State*, 71.
- 42. § 4299. Degree of murder to be found by the jury. *Storey v. State*, 329.
- 43. § 4369. Trading in farming products between sunset and sunrise. *Gilliam v. State*, 10; *Russell v. State*, 348.
- 44. §§ 4454-5. Confession of judgment for fine and costs. *Burke v. State*, 377.
- 45. §§ 4629-30. Abatement of prosecution for misdemeanor in circuit court. *Moore v. State*, 307.
- 46. § 4765. Oath to petit jury. *Allen v. State*, 5; *Storey v. State*, 329.
- 47. § 4785. Indictment. *Goree v. State*, 7.
- 48. §§ 4816-20. Suspension of statute of limitations in criminal cases. *Coleman v. State*, 312.

COMMON CARRIER.

- 1. *Common law liability of; measure of.*—By the common law a common carrier is absolutely liable for the safety of goods entrusted to him for transportation, and is responsible for injuries or losses which can not be directly traced "to the act of God, or of the public enemy, or of the party complaining;" and for goods which he fails to deliver, the measure of his liability is the value of the goods at the place of delivery, at the time when they ought to have been delivered. *Ala. Gt. Sou. R. R. Co. v. Little*, 611.
- 2. *Same; to what extent may be limited by special contract.*—It is now well settled that a common carrier may, by special contract, limit or qualify his liability as an insurer, or his common law liability, that is, his liability for losses occurring by unavoidable accidents, not within the exception of "the act of God, or of the public enemy, or the fault of the party complaining," not only touching the risks or accidents for which he is answerable, but also as to the amount of damages for which he will be liable in the event of loss or injury, when the purpose appears to secure a reasonable and just proportion between his liability and his compensation. *Ib.* 611.
- 3. *Liability of; when he can not limit or qualify.*—But public policy and every consideration of right and justice forbid that a common carrier should be allowed to stipulate for exemption from, or limitation of his liability for losses or injuries occurring through the want of his own skill or diligence, or that of the servants or agents he may employ, or through his or their willful default or tort. *Ib.* 611.
- 4. *Same.*—Where a common carrier stipulated in a bill of lading, given for alcohol delivered to it for shipment, that, "in consideration of rates inserted, it is agreed that, in case of loss or damage, the same shall be adjusted at a valuation of twenty dollars per barrel," he is liable, in the event of a loss not occurring from the want of ordinary care, skill or diligence, only for the amount expressed; but if the loss resulted from a want of ordinary care, skill or diligence, he is liable for the full value of the goods, as for exemption from this liability he has not stipulated, and the law will not tolerate that he should stipulate. *Ib.* 611.
- 5. *Bill of lading executed by; when a special contract.*—A bill of lading given by a common carrier, on the delivery of goods to him for transportation, and accepted by the shipper or consignor with knowledge of its contents, or with the opportunity of acquiring

COMMON CARRIER—*Continued.*

- knowledge thereof, if he is reasonably prudent, limiting the extraordinary liability of the carrier, is deemed and regarded as a special contract. *Ib.* 611.
6. *Liability of; presumption of negligence.*—Where goods are lost or damaged, while in the custody of a common carrier under a special contract, and he gives no account or explanation of the loss or injury, a presumption of negligence follows, rendering him liable. *Ib.* 611.
 7. *Liability of for loss of freight shipped to a "flag station;" burden of proof.*—Where, in an action against a railroad company, as a common carrier, to recover damages for the failure to deliver a quantity of corn received by it for transportation to a designated point on the road, at which there was neither depot nor agent, it was shown that the corn was received by the company and transported in good condition to the place of destination, and the car in which it was shipped, was placed on a side-track for the consignee, where it remained for several days, with no one in charge of, or protecting it, and that when the corn was taken from the car and measured, there was a deficiency in quantity,—*held*, that the burden of proof was on the plaintiff to show that the loss occurred between the time when the corn was received by the company, and the time when the car containing it was left on the side-track, that being, under the facts of this case, a delivery, and not on the defendant to show that the loss occurred after the car was placed on the side-track. *South & North Ala. R. R. Co. v. Wood*, 215.
 8. *Sale; effect of delivery to common carrier.*—A delivery of goods to a carrier for the buyer, in accordance with his specific request, is a delivery to the buyer. *Pilgreen v. State*, 368.
 9. *Same; relation of the common carrier to the parties.*—When goods are forwarded through an express company, by instructions of the purchaser, marked "C. O. D.," the carrier is the agent of the purchaser to receive the goods from the seller, and the agent of the seller to collect the price from the purchaser; and the sale is complete when the goods are delivered to the carrier. *Ib.* 368.
 10. *Local statute prohibiting sale of intoxicating liquors; when sale not violative of.*—A sale, to be in violation of a local statute, making it unlawful "to sell, etc., spirituous, vinous, or malt liquors," within a designated locality, must be made in that locality; and hence, a sale, passing the title, made in a different locality, where the liquor is set apart and delivered to an express company, to be by it transported into the territory covered by the statute, and there delivered to the buyer, is not within the words or spirit of the statute, although the liquor is sent "C. O. D.," by instructions of the buyer, and he pays the price therefor on delivery. *Ib.* 368.
 11. *Sale by common carrier of freight; good faith and diligence required.*—An agent of a common carrier is not only held to good faith in making a sale under the statute of packages held for freight, but also to reasonable diligence in ascertaining and giving notice of the contents of the packages. *Nathan Bros. v. Shivers*, 117.
 12. *Same; what reasonable diligence implies.*—Reasonable diligence in such case requires that the agent must examine all external indicia and marks on or about the packages, and all other sources of information, reasonably within his reach; but he is neither required nor authorized to break or open the packages for the purpose of ascertaining their contents. *Ib.* 117.
 13. *Same; when agent and purchaser liable to owner.*—If the agent knows the contents of the packages, or has good reason for believing what they are, and, withholding such knowledge or well-founded belief, he makes the sale to a favorite having superior knowledge, and at a nominal price, this constitutes a fraud which subjects the per-

COMMON CARRIER—*Continued.*

petrators to an action for damages, at the suit of the party injured. *Ib.* 117.

14. *Same; diligence and good faith, questions for the jury.*—Whether the agent knew, or could have learned, or had just grounds for believing what were the contents of the packages, and whether he acted in good faith in giving the notice prescribed by statute, and in making the sale, are questions for the jury, under appropriate instructions from the court. *Ib.* 117.

See RAILROAD.

CONFEDERATE MONEY.

1. *Power of this court over results of former erroneous rulings as to Confederate transactions.*—This court can exert no power over the hardships which have resulted from former erroneous rulings in reference to Confederate transactions. They present, however, “strong claims for concession, compromise and adjustment, graduated by a scale approximating true value.” *Roberts v. Rice*, 187.
2. *Judgments on contracts based on Confederate prices conclusive.*—A judgment rendered in 1871 on a promissory note executed in 1864, for purchase-money of personal property then bought at administrator’s sale, is conclusive between the parties, and can not be assailed or scaled on account of Confederate prices. *Ib.* 187.
3. *Payment of debt to trustee in Confederate money; effect of.*—The principle is firmly settled by the numerous decisions of this court, that whatever liability trustees may have incurred to *cestuis que trust* by accepting Confederate money, during the late war, in payment of debts due to the trust estate, “as to the debtor, the debt is extinguished as completely as if the payment had been made in gold and silver.” *Trustees of Howard College v. Turner*, 429.
4. *Same.*—Where one subscribed to the endowment fund of a college, a corporation under the laws of this State, prior to the late war, and gave his promissory notes to the amount of his subscription, and afterwards, and during the war, paid the notes in Confederate treasury notes, and received from the trustees, in pursuance of a prior agreement and the by-laws of the corporation, a certificate of permanent scholarship in the college, entitling him to the tuition of one pupil *in perpetuo*, the receipt of the Confederate money by the trustees operated a payment of the notes, and entitled the subscriber to his certificate; and hence, the fact that such payment was made in Confederate money is no defense to an action brought by the holder of the certificate of scholarship against the corporation for a breach thereof. *Ib.* 429.

CONFUSION OF GOODS.

1. *Doctrine applies to mortgaged chattels.*—Where the owner of goods willfully, or through want of proper care, so mixes or mingles them with the goods of another, that they can not be distinguished, the latter is entitled to the whole, unless he consented to the act; and this principle applies to mortgaged chattels, and a confusion thereof by the mortgagor with other chattels owned by him makes the whole *prima facie*, at least, subject to the lien and operation of the mortgage. *Burns v. Campbell*, 271.

CONSTITUTIONAL LAW.

1. *Section 4 of Art. 14 of constitution construed.*—Soliciting and receiving subscriptions for a newspaper published in another State by a corporation, is not doing “business” in this State, within the meaning of section 4, article 14, of the constitution, prohibiting foreign

CONSTITUTIONAL LAW—*Continued.*

- corporations from doing any business in this State without having at least one known place of business, and an authorized agent or agents therein. *Beard v. Union & Amer. Pub. Co.* 60.
2. *Second section of act of December 8th, 1880, unconstitutional.*—No legislative attempt having been made prior to the passage of the act of December 8th, 1880, to tax the shares of national banking associations, the second section of the act, providing that "there shall be assessed and collected in any county where such association is located, upon each share of the capital stock of such association which has escaped taxation for any preceding year since 1874, the same rate of taxation, State and county, as was in each year assessed and collected upon other moneyed capital," is violative of sections 4 and 5 of article 11 of the constitution, limiting the rate of taxation in any one year for State and county purposes. *Maguire v. Board of R. & R. Com'rs Mobile Co.* 401.
 3. *Distinction between levy and assessment of taxes; constitutional inhibition applies to former, not to latter.*—The constitutional inhibition is against levying taxes, a legislative function, and not against assessing taxes, the work of the assessor; and hence, the constitution does not inhibit the assessment and collection of taxes which have been levied, but which have escaped the assessor, or, by reason of defective machinery, could not be collected. But when the legislature declares a new subject of taxation, not theretofore taxed, or attempted to be taxed, and levies a tax upon it, which, in the aggregate, transcends the constitutional limit, calling it a tax for past years can not heal the infirmity. *Ib.* 401.
 4. *Section 4 of article 11 of constitution, limiting rate of taxation; when statute not within inhibition*—Section 4 of article 11 of the constitution was not intended to prohibit the enactment of a statute which should operate from year to year until altered or repealed, as the legislative function may be performed in one year, to be operative for successive years; but its meaning is, that a greater burden than three-fourths of one per cent. shall not be levied or imposed in and for one year. *Ib.* 401.
 5. *Rights of transit through the State guaranteed to citizens by the constitution.*—Under constitutional provisions both State and Federal, every citizen of the United States and of the several States of the Union has, as an attribute of personal liberty, the right of free egress from, and transit through the State, unless restrained by due course of law; and this right is subject only to such legislative regulations as may be imposed by the exercise of the police power of the State, or as may remotely affect it in the legitimate exercise of the power of State taxation. *Joseph v. Randolph*, 499.
 6. *Constitutionality of statutes; how determined.*—A statute is to be interpreted according to the intention of the legislature, apparent on its face, and its constitutionality must be determined by its natural and reasonable effect. *Ib.* 499.
 7. *Same; power of legislature to regulate constitutional right.*—No principle of construction is sounder than the common-sense and cardinal rule, that "what can not be done directly can not be done indirectly;" and hence, a constitutional right, though subject to regulation, can not be destroyed, or impaired under the device or guise of being regulated. *Ib.* 499.
 8. *Act of January 22, 1879 (Pamph. Acts, 1879-80, p. 205), as amended by act of December 8, 1880, (Pamph. Acts, 1880-1, p. 162), unconstitutional.*—The act of January 22, 1879 (Pamph. Acts, 1879-80, p. 205), as amended by act of December 8, 1880 (Pamph. Acts, 1880-1, p. 162), providing that "no person, whether for himself or other persons, shall be permitted to employ, engage, contract, or in any other way induce laborers to leave" the counties designated in

CONSTITUTIONAL LAW—*Continued.*

the act, "for the purpose of removing said laborers from this State, without first paying to each of said counties in which such person shall operate a license tax of two hundred and fifty dollars, such license tax to be collected as other license taxes," etc., and declaring a violation of its provisions a misdemeanor, being an indirect tax upon the citizen's right of free egress from the State, and operating to hinder the exercise of his personal liberty, and to seriously impair his right to emigrate, is violative of both the State and Federal constitutions, and is void. *Ib.* 499.

9. *Same; can not be sustained as a legitimate exercise of the police power of the State.*—Said act has none of the characteristics of a law designed to provide regulations promotive of domestic order, morals, health, or safety, or kindred subjects, properly falling within the purview of domestic police; and hence, it can not be sustained as a legitimate exercise of the police power of the State. *Ib.* 499.
10. *Same; can not be sustained as a license tax.*—Nor can the act be sustained as a statute designed to impose a mere occupation or business tax; because, on its face, and by its terms, a license is required for the doing of a single act, and not for carrying on a business or occupation. *Ib.* 499.
11. *Statutes authorizing judgments in attachment suits without personal notice valid.*—The statutes of this State, as they formerly existed, authorizing personal judgments against defendants in suits commenced by attachment, without other notice than the levy of the attachment on the property or effects of the defendant gave, were consistent with the constitution; and judgments rendered therein, as between citizens of, and as to property found in, this State, were of the same force and effect, when drawn in question collaterally, as if they had been rendered on personal service. *Betancourt v. Eberlin, Adm'r, 461.*

CONTEST OF EXEMPTIONS.

1. *Exemption; contestation of, a suit; by what facts supported.*—The contestation of a claim of exemptions is essentially a suit, in which the plaintiff causing the levy is the actor, and the levy is the institution of the suit. The causes of contest assigned must be supported by facts existing at the time the contest is instituted; and the subsequent occurrence of facts essential to the plaintiff's right of recovery, operating to defeat or divest the right of exemption, will not support the contest. *McCrary v. Chase & Co. 540.*
2. *Same.*—Hence, where personal property levied on under an execution was claimed as exempt by the defendant in execution, and the claim was contested, and at the time of the levy and of making the claim the defendant was a resident of this State, his subsequent removal from the State, and residence in another State at the time of the trial of the contest can not deprive him of his right to an exemption of the property levied on from the payment of the execution. *Ib.* 540.

See EXEMPTIONS.

HOMESTEAD.

CONTRACTS.

1. *Contract for delivery of personal property; place of delivery.*—Under a contract for the delivery of specific articles of personal property, which specifies no place of delivery, the general rule is, especially where such articles are cumbersome, that they are to be delivered at the place where they are situated, or are to be manufactured. In such case the vendor is not bound to send or carry the goods to

CONTRACTS—*Continued.*

- the vendee, but is only required to deliver them on demand. *Ragland v. Wood*, 145.
2. *Same; when payable in money.*—Such a contract does not become payable in money, or the foundation of a suit for damages for a breach thereof, until there has been a demand by the purchaser or his assignee, and a refusal on the part of the vendor to deliver. (*Overruling Cobb v. Reed*, 2 *Stew.* 444, on this point.) *Ib* 145.
 3. *Same; construction of.*—A contract by the owner of a saw mill for the delivery of a stated amount of lumber to a purchaser, one-half during the year 1877 and the other half during the year 1878, without designating the place of delivery, must be construed as an agreement on the vendor's part to deliver the lumber at his mill, one-half during each of said years, on the purchaser's demand; and until such demand is made, in the absence of facts dispensing with the necessity therefor, there is no default or breach of the contract. *Ib* 145.
 4. *Same; from what date bears interest.*—Debts or obligations payable on demand do not bear interest until a demand is made, or suit is instituted; and hence, interest would run on such a contract only from a breach thereof. *Ib* 145.
 5. *Debt contracted by executor; when imposes only a personal liability.* Under the provisions of a will directing the testator's estate to be kept together and managed by the executor until the youngest child should attain the age of twenty-one years, and authorizing the executor to transact any business pertaining to the interests of the estate without the orders of any court, the executor has no authority to contract, on the credit of the estate, for the services of a party to take charge of, and superintend the cultivation of lands belonging to the estate; and such a contract, made in 1861, only imposed a personal liability on the executor. *Vann v. Vann, Ex'r*, 154.
 6. *Recovery on joint and several contracts.*—Under the statute (Code of 1876, §§ 2905, 2919), written obligations and promises of any description are several as well as joint; and in a suit against the obligors or promisors a recovery may be had against one or more of them, as the facts in evidence may justify. *Steed v. Barnhill*, 157.
 7. *Certificate of permanent scholarship in a college; its effect and obligation.*—A certificate of permanent scholarship, issued by the trustees of Howard College, a corporation, under the provisions of its charter and by-laws, by which the holder, in consideration of money paid, became entitled to the tuition of one pupil *in perpetuo*, is a valid and binding contract, conferring upon the holder the right to send any fit person within his option to the college as a pupil, to be educated, subject to the usual regulations of the institution, free of tuition, and imposing upon the corporation a corresponding legal obligation, a breach of which is a ground of action. *Trustees of Howard College v. Turner*, 429.
 8. *Same; what constitutes a breach thereof.*—The refusal of the corporation to permit the holder of the certificate of permanent scholarship the benefit thereof, by denying to him the right to appoint a pupil to attend the institution, free of tuition *in perpetuo*, is a breach of the contract evidenced by the certificate, which the holder is authorized to treat as a total breach, and for which full and final damages may be recovered in one action. *Ib* 429.
 9. *Same; measure of damages in action for breach of.*—In *assumpsit* by the holder of such certificate against the corporation for a breach of the contract evidenced by the certificate, the measure of damages is the value of the scholarship, with lawful interest. *Ib* 429.
 10. *Same.*—It not being shown in such case that the scholarship had any marketable value, and in the absence of evidence tending to

CONTRACTS—*Continued.*

show that it was of less value at the commencement of the suit than at the date of purchase,—*held*, that *prima facie*, at least, the value of the scholarship was the price agreed to be paid for it. *Ib.* 429.

11. *Contract entered into by correspondence; date of.*—When a contract is made by letters, offering and accepting a stated proposition, sent and received by mail, the date of the letter of acceptance is the date of the contract. *Horton v. Wollner, Hirshberg & Co.* 452.

See CHANCERY.

FRAUDS, STATUTE OF.

INFANTS.

INSURANCE, FIRE.

INSURANCE, LIFE.

MORTGAGE.

SALE.

VENDOR AND PURCHASER.

CORPORATIONS.

1. *Section 4 of Art. 14 of Constitution construed.*—Soliciting and receiving subscriptions for a newspaper published in another State by a corporation, is not doing "business" in this State, within the meaning of section 4, Art. 14, of the constitution, prohibiting foreign corporations from doing any business in this State without having at least one known place of business, and an authorized agent or agents therein. *Beard v. Union & Amer. Pub. Co.*, 60.
2. *Power of corporations to change contracts by subsequent by-laws; when such by-laws become part of the contract.*—While it is only existing by-laws of a corporation which are presumed to be known, and in reference to which it is presumed corporate contracts are made; and while it is true that a corporation has not the power, by laws of its own enactment, to disturb or divest rights which it had created, or to impair the obligation of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations; yet, parties may contract with corporations in reference to laws of future enactment, and may agree to be bound and affected, as they would be bound and affected if such laws were existing; and they may thereby consent that such laws may enter into, and form part of their contracts, modifying or varying them. *Supreme Commandery, Knights of Golden Rule v. Ainsworth*, 436.
3. *Private corporation; may be dissolved by act of stockholders.*—A private corporation, organized under the general law, for the purpose of conducting a purely private enterprise, entered upon solely for the benefit of the shareholders, no matter of duty, public in its nature, or pertaining to the public welfare, being enjoined or assumed, which would not equally obtain, if the stockholders had, without incorporation, formed a joint stock company or partnership, having the same objects in view, may be dissolved by the stockholders without obtaining the consent of the State; and the duration of its corporate existence may be limited by a by-law adopted at the time of its organization. *Merchants & Planters Line v. Waganer*, 581.
4. *Same; dissolution at period fixed by law; continuance of business after dissolution; nature of, and rights and duties of parties.*—A by-law of such corporation, adopted at the time of its organization,

CORPORATIONS—*Continued.*

providing that it shall be dissolved on a designated day in the future, puts an end to the corporation on the day designated; and its continuance thereafter is merely permissive, the result of silent acquiescence, and it can only be regarded as a joint stock company, having no fixed duration, and being liable to be terminated at the mere will of any of the parties in interest; but so long as the shareholders continue to act in joint adventure after such dissolution, they must be presumed to have agreed to be governed by the same authority and rules as those which governed the corporation. *Ib.* 581.

See CHANCERY, 1-3.

CONFEDERATE MONEY, 4.

INSURANCE, LIFE.

RAILROADS.

COSTS.

See CHANCERY, 16.

ERROR AND APPEAL, 11.

EXECUTORS AND ADMINISTRATORS.

MILL-DAM.

CRIMINAL LAW, 1.

COUNTY TREASURER.

See SUMMARY PROCEEDINGS.

COURT, COMMISSIONERS.

See SUMMARY PROCEEDINGS.

COURT, COUNTY.

See CULLMAN COUNTY.

ERROR AND APPEAL.

MADISON COUNTY.

COURT, PROBATE.

See CHANCERY, 11.

ESTATES OF DECEDENTS.

EXECUTORS AND ADMINISTRATORS.

HOMESTEAD.

MILL-DAM.

TAX SALES.

CRIMINAL LAW.

I. ASSAULT AND BATTERY.

See *infra*, sub-titles, EVIDENCE, and PLEAS AND DEFENSES.

II. BURGLARY.

See *infra*, sub-title, PLEAS AND DEFENSES.

CRIMINAL LAW—*Continued.*

III. BUYING COTTON IN THE SEED IN VIOLATION OF LOCAL STATUTE.

See *infra*, sub-title, INDICTMENT.

IV. COSTS.

1. *Hard labor for costs; when sentence sufficient.*—Where the record does not show that the bill of costs includes any costs, for the payment of which the defendant can not be legally imprisoned, a judgment of conviction, specifying the exact duration of the additional hard labor imposed for costs, is sufficient. *Croom v. State*, 14.

See ERROR AND APPEAL.

V. EVIDENCE.

2. *Declaration of defendant; when inadmissible.*—It is not competent for a defendant indicted for larceny and who defends under a claim of ownership, to introduce in evidence a declaration made by him while in possession of the property alleged to have been stolen, showing how his asserted right or claim originated. Such declaration is no part of the *res gestæ*, but merely a recital of a past transaction. *Allen v. State*, 5.
3. *When declarations made in presence of deceased incompetent.*—Where, on the trial of a defendant indicted for murder, it was shown that the deceased came to his death from a cut or stab made at night with a knife or some other sharp instrument, the fact that one who was present at the scene of the crime, but who was not examined, told a witness, a short time after the wound was inflicted, in the presence of the deceased, that he did not know who struck the deceased, that it was too dark to recognize any one, and that the deceased heard the statement and made no reply, is not competent evidence for the defendant, although no eye-witness to the transaction was examined, and the State relied in part on dying declarations of the deceased, subsequently made, to show that the defendant dealt the fatal blow. *Sylvester v. State*, 17.
4. *When evidence irrelevant and inadmissible.*—The guilt or innocence of a defendant in a criminal case can not be, in any manner, affected by *ex parte* statements made in his absence, whether they be inculpatory or exculpatory; and hence, on the trial of a defendant charged with murder, the fact, that, on an inquest held over the body of the deceased, no charge was made against the defendant, and no evidence was introduced, implicating or tending to implicate him in the killing, is irrelevant and should be excluded from the jury, when it is not shown that any of the witnesses for the State were examined before the coroner, and their testimony could not thereby be impeached. *Ib.* 17.
5. *Testimony taken before coroner; when inadmissible on trial for murder.*—The written statement of the testimony of a witness examined before a coroner, and by him reduced to writing, on an inquest held by him over the body of the deceased, is not competent evidence for a defendant on trial for murder, on proof that the witness had removed from the State. *Ib.* 17.
6. *Cross-examination of witness; what competent to show on.*—It is competent for the State, on the cross-examination of a witness examined on behalf of a defendant on trial for murder, and who had testified to material facts relating to the commission of the offense, for the purpose of testing his bias or prejudice, to show that the witness had been summoned as a juror on a former trial of the cause, and that he had then stated on his *voir dire*, that he had no fixed opinion as to the defendant's guilt or innocence that would bias his verdict. *Ib.* 17.

CRIMINAL LAW—Continued.

7. *Dying declarations; theory on which they are admissible in evidence.*
Dying declarations are not admissible in evidence merely on the ground, that they are not willfully or intentionally false; but from the necessity of the case, in order to bring man-slayers to justice, and because, being uttered under a sense of impending death, the solemnity of the occasion is tantamount to the safeguard of an oath. *Ib.* 17.
8. *Same; weight of.*—If such declarations point to the identity of the defendant, as the guilty agent, with the same clearness and certainty as if the deceased had designated him by name, they are entitled to as much weight as if the defendant's name had been expressly mentioned. *Ib.* 17.
9. *Flight of defendant as evidence of guilt.*—The flight of a defendant in a criminal case may or may not be considered as a circumstance tending to prove guilt, depending on the motive which prompted it,—whether a consciousness of guilt and a pending apprehension of being brought to justice caused the flight or whether it was caused from some other and more innocent motive. *Ib.* 17.
10. *Homicide; general character of deceased for violence; degrees in.*
Where on the trial of a defendant indicted for murder a witness examined on his behalf had testified that he knew the general character of the deceased for peace, and that, outside of his friends, he was regarded as a turbulent and dangerous man, it is error for the court to require the defendant, on motion of the State, to incorporate in a question propounded by him to the witness touching the deceased's general character for violence, the words "blood-thirsty," "quarrelsome," "turbulent," "vengeful" and "dangerous." There are degrees in a quarrelsome or turbulent character; and, the proper predicate of knowledge being laid, the defendant should be free to ask such legal questions as he may elect to ask. *DeArman v. State*, 351.
11. *Cross-examination of witness as to general character; what questions permissible.*—As character manifests itself by the manner in which one is esteemed, spoken of, or received in society, it is always permissible, on cross-examination of a witness testifying in reference thereto, to ascertain the extent of his information, the foundation of his opinion, or the data from which he draws his conclusion; and hence, on the trial of a defendant indicted for murder, in which the general character of the deceased for peace was an issue, it is error for the court to refuse to allow the defendant, on cross-examination of a witness examined by the State, who had testified that the deceased's general character for peace and quiet was good, to ask the witness whether he had not heard of certain enumerated acts of violence done by the deceased. *Ib.* 351.
12. *Violent or blood-thirsty character of deceased; when material.*—When it is doubtful who was the aggressor, the known violent or blood-thirsty character of the deceased is a material matter to be considered by the jury, as more prompt and decisive measures of defense are justifiable against such an assailant. But this principle is confined to defensive measures; and it furnishes no excuse or palliation for aggressive action, nor when the difficulty is brought on, or sought by the accused. *Ib.* 351.
13. *Confession; admissibility of.*—Held, under the facts shown by the evidence in this case, that a confession made by the defendant to an officer who had him in his custody, was voluntary and admissible. *Ib.* 351.
14. *Self-defense; when previous threats by deceased may be considered in aid of.*—While previous threats do not make out the plea of self-defense, but there must be an actual or apparent present, impending peril to life or limb, either so menacing as to render any at-

CRIMINAL LAW—Continued.

- tempt to escape an increase of the peril, or such peril as can not reasonably be otherwise avoided, before life can be taken even by one who is without fault himself; yet, such threats, if proved, and made known to the defendant, should be weighed by the jury, with other acts indicating hostility, in determining whether the fatal act was done under the reasonable and honest conviction, that its perpetration was then and there necessary to save the accused from the loss of his life, or from suffering great bodily harm. *Ib.* 351.
15. *Threatening letters written by witness to defendant; when admissible.* Where on the trial a defendant indicted for an assault with intent to murder, the person upon whom the assault was made was examined as a witness for the prosecution, letters written by the witness to the defendant, and received by the latter a short while prior to the assault, showing hostility to the defendant, and threatening in character, are admissible in evidence on behalf of the defendant, for the purpose of proving the witness' hostile feelings towards him, and of shedding light on the witness' credibility. *Burke v. State*, 377.
16. *Same; for what purpose not admissible.*—But where in such case, the defendant is shown to have been the aggressor, the letters, although containing threats against the life of the defendant, can not excuse or extenuate the assault. Parties can not, under a pretext of self-defense, bring on a difficulty, and shield themselves from punishment by proof of previous threats. *Ib.* 377.
17. *Motive or intention; how proved.*—Motive or intention is an inferential fact, to be drawn by the jury from proven, attendant facts and circumstances; an uncommunicated belief, motive, or intention can not be testified to by a party to a civil suit, when examined as a witness, nor can it be stated by a defendant in a criminal case in the unsworn statement which he is allowed to make under the statute. *Ib.* 377.
18. *Threats by defendant against deceased; admissibility of.*—While threats by the defendant to kill one man may not be admissible under an indictment for the murder of, or assault with intent to murder another, threats to kill or injure some one not definitely designated, especially when made shortly before the commission of the offense to which they may be construed to have reference, are admissible in connection with other explanatory circumstances, on proof of the *corpus delicti*. It is a matter of mere inference whether the deceased came within the scope of such threats; and their weight or probative force is a question entirely for the jury. *Ford v. State*, 385.
19. *Homicide; what admissible as an act of preparation.*—On the trial of a defendant for murder, it being shown that the homicide was committed in the afternoon, and that the defendant and deceased had had a difficulty in the morning of the same day, and that bad feelings existed between them during the intervening hours,—held, that the primary court committed no error in admitting the testimony of a witness for the State, against defendant's objection, to the effect that after the first difficulty, and a short time prior to the fatal act, the defendant had proposed to exchange knives with the witness, showing him at the time a small knife, and assigning as a reason, that his knife was too small. Such testimony may have been comparatively weak, but it was clearly relevant as an act of preparation, when taken in connection with the previous difficulty, and bad feelings between the parties. *Ib.* 385.
20. *Competency of witnesses who are not experts on questions of insanity vel non.*—Where a witness who is not a medical expert expresses an opinion, affirming the insanity of a party, it is the better and safer practice that his opinion should be preceded by the facts and

CRIMINAL LAW—*Continued.*

circumstances upon which it is based, they being necessarily eccentric manifestations and abnormal facts affirmative in their nature; but when the witness testifies to the sanity of a party, there may be no such eccentric manifestations or abnormal facts, and "he may testify to the non-existence thereof by way of general negative." *Ib.* 385.

21. *Same.*—The competency of the witness in such case depends simply upon the fact that he has an acquaintance with the party whose sanity is in issue, of sufficient duration and intimacy to have afforded him opportunities for such frequent observation as to justify the formation of a correct opinion. *Ib.* 385.
22. *Same.*—It is impossible to lay down any precise rule as to the length or character of acquaintance which will render the opinion of such witness admissible; and it must rest, to a considerable extent, within the sound legal discretion of the primary court. *Ib.* 385.
23. *When party can not complain of ruling of primary court allowing irrelevant evidence.*—When a defendant in a criminal case, on direct examination of his own witness, elicits irrelevant evidence, he can not complain that the prosecution is allowed, on cross-examination, to bring out other irrelevant evidence, by way of explanation or rebuttal, touching the same subject-matter. *Ib.* 385.
24. *Credibility of witness; when charge in reference to, free from error.* It is error for the court to refuse a charge requested by a defendant in a criminal case, there being a conflict in the evidence, instructing the jury, that "if there is a conflict in the testimony of the witnesses offered by the State, and those offered by the defendant, the jury must determine which of said witnesses they will believe; and that in determining what weight they will attach to the testimony of any particular witness, they may look to the manner of such witness on the stand, and to his interest and feeling, if any, in the case, and as to whether or not he has been contradicted by other witnesses in the cause, or by his own previous statements." *Storey v. State*, 329.
25. *Instructions by principal to agent to buy farm products; presumption in reference to; act and declaration of agent as evidence against principal.*—Where an agent is instructed to buy for his principal farm products, trading in which between sunset and sunrise is prohibited, the law presumes, in the absence of proof to the contrary, that the instructions were to buy at a time not prohibited by the statute; and hence, on the trial of the principal, indicted for the act of the agent in buying at a time covered by the statutory prohibition, the fact of the purchase, and the declaration of the agent at the time it was made, that he was buying for the defendant, are inadmissible against him, "without bringing home to him the criminal design of the agent." *Russell v. State*, 348.
26. *Cross-examination of witness; when hostility to a party admissible.* As affecting credibility, it is permissible, on cross-examination, to inquire of a witness touching his relations to the parties, or to the subject-matter of controversy, or as to the feelings of sympathy, or partiality, or hostility which he may entertain, or may have expressed towards the party introducing him, or against the party against whom he is introduced; and also to show the degree or extent of such feelings. *Yarbrough v. State*, 376.
27. *Same; when expression of hostility admissible.*—Hence, it is error for the primary court to refuse to allow the defendant in a criminal case to ask, on cross-examination, a witness examined by the State, who had testified that his feelings towards the defendant were unkind, whether he had not said, a short time prior to the trial, to one of defendant's counsel, that he would give \$1,000 to send the defendant to the penitentiary. *Ib.* 376.

CRIMINAL LAW—Continued.

28. *Motive or belief; how proved.*—It is for the jury to infer motive, belief, or intention, when a material issue, from the facts and circumstances in the case; they can neither be testified to by witnesses, nor made a part of a defendant's statement. *Whizenant v. State*, 383.
29. *Witness' belief or conclusion; when inadmissible.*—On the trial of a defendant indicted for the larceny of two oxen, the evidence connecting the defendant with the larceny tending to show a sale by him of two oxen in witness' presence, and the question being one of identity, it is not permissible for the witness to prove a previous unsworn description which another, when in search of the stolen oxen, had given him, and his belief or conclusion that the description given him corresponded with his recollection of the oxen which the defendant sold in his presence. *Ib.* 383.

See *infra*, sub-title, STATEMENT BY DEFENDANT.

VI. HOMICIDE.

30. *Malice implied from use of deadly weapon; character of weapon a question for the jury.*—Malice may be implied from the use of a deadly weapon; and the character of the weapon used, whether deadly or otherwise, is, in most cases, a question for the jury, to be determined from its description by witnesses, the nature of the wound inflicted, the opinion of experts, and other circumstances in evidence. *Sylvester v. State*, 17.
31. *Charge assuming pocket-knife not a deadly weapon erroneous.*—The refusal of a charge requested by a defendant on trial for murder, which assumes, as matter of law, that a pocket-knife is not a deadly weapon, is free from error. *Ib.* 17.
32. *Malice presumed from use of deadly weapon; burden of proof.*—The law presumes malice from the use of a deadly weapon, and casts on the defendant the *onus* of repelling the presumption, unless the evidence which proves the killing also shows that it was done without malice; "in other words, the burden of proving that a homicide was committed in self-defense rests on the defendant, unless it can be deduced from the facts and circumstances which prove the killing." *De Arman v. State*, 351.
33. *Same.*—But if the testimony which proves the homicide, proves also its excuse or justification, then the burden is not shifted, and the defendant need introduce no proof. *Ib.* 351.
34. *Murder; conviction of murder in second degree an acquittal of murder in the first degree.*—A conviction of murder in the second degree is an acquittal of murder in the first degree; and, on appeal from the judgment of conviction in such case, this court will not consider the rulings of the primary court on questions relating to murder in the first degree, as, on a second trial, after reversal and remandment, all distinction between the degrees will be wholly immaterial. *Ib.* 351.
35. *Same; failure of court to instruct the jury as to constituents of manslaughter; when free from error.*—On the trial of a defendant for murder, the failure of the primary court to instruct the jury as to the constituents of manslaughter in its general charge is not an error of which he can complain on appeal. If he deemed the instructions not full enough on any point, he should have asked specific instructions; and failing to do so, this court can not consider the question. *Ib.* 351.
36. *Same.*—The failure of the primary court to so charge is free from error in this case for the additional reason, that the bill of exceptions purports to set out all the evidence, and contains no evidence tending to show that the offense, if any was committed, was, or could

CRIMINAL LAW—*Continued.*

- be manslaughter; the defendant being, under the evidence, either guilty of murder, or justifiable in the commission of the homicide under the law of self-defense. *Ib.* 351.
37. *Self-defense*.—If a defendant indicted for murder did not provoke, or bring on the difficulty, but approached the deceased in an orderly and peaceful manner, and the deceased replied angrily and insultingly, advanced towards him, and placed his hand upon, or in the direction of his pistol pocket in such manner as to indicate to a reasonable mind that his purpose was to draw and fire, the defendant was authorized to anticipate him and fire first. *Ib.* 351.
38. *Same*.—The rule in such case would not be varied, if it should turn out that the deceased was in fact unarmed, as the law of self-preservation did not require the defendant to wait until the weapon was presented, ready for deadly execution; but he had the right to act on the reasonable appearance of things. The danger, however, must have been real, or so manifestly apparent as to create a reasonable belief of present impending peril to life or limb; and the defendant must not have been instrumental in provoking or bringing it on. *Ib.* 351.
39. *Same; when defendant not required to retreat*.—If the accused, with no intention of bringing on a difficulty, approached the deceased in a peaceable manner, and the deceased made the first hostile demonstration, by drawing, or attempting to draw a weapon, or by appearing to do so, the appearances coming within the rule declared above; and if the accused was in such proximity to the deceased as to render it hazardous to attempt flight; or if the assault was made with a deadly weapon, and was open and direct, and in perilous proximity; then, the law would not require the accused to endanger his safety by attempted flight. *Ib.* 351.
40. *When plea of self-defense is unavailing*.—But if the accused approached the deceased for the purpose of bringing on a difficulty with him, or had previously formed the design of taking his life, the plea of self-defense would be unavailing. *Ib.* 351.
41. *Violent or bloodthirsty character of deceased; when material*.—When it is doubtful who was the aggressor, the known violent or bloodthirsty character of the deceased is a material matter to be considered by the jury, as more prompt and decisive measures of defense are justifiable against such an assailant. But this principle is confined to defensive measures; and it furnishes no excuse or palliation for aggressive action, nor when the difficulty is brought on, or sought by the accused. *Ib.* 351.
42. *Law of self-defense; accused must be free from fault*.—It is a fundamental principle of the law of homicide, when the doctrine of self-defense is invoked, that the accused must be free from fault in having provoked or brought on the difficulty in which the killing was perpetrated; if he himself was the aggressor, he can not be heard to urge, in his own justification, the necessity for the killing which was produced by his own wrongful act. *Storey v. State*, 329.
43. *Same; when duty of accused to retreat*.—Another important principle of the law of homicide, governing, at least, cases of mere assault, or of mutual combat, where the attacking party has not "the purpose of murder in his heart," is, that the right of self-defense does not arise until the defendant has availed himself of all proper means in his power to decline the combat by retreat, provided there be opened to him a safe mode of escape. *Ib.* 329.
44. *Same; when accused need not retreat*.—But where the assault is manifestly felonious in its purpose, and forcible in its nature, as in murder, rape, robbery, burglary, and the like, as distinguished from secret felonies, such as mere larceny from the person, etc., the party attacked is under no obligation to retreat; but he may,

CRIMINAL LAW—*Continued.*

- in such case, if necessary, stand his ground and kill his adversary.
Ib. 329.
45. *Same; when accused assailed with deadly weapon.*—This principle, however, when applied to attack made with a deadly weapon, must be limited to those cases, in which the attack with the deadly weapon is made under such circumstances as to reasonably justify the conclusion, that the party assailed, by retreating, will apparently put himself at a disadvantage. *Ib.* 329.
46. *Same; reasonable belief of imminent peril, and of urgent necessity to take life.*—To enable one charged with homicide to make out a case of self-defense, the circumstances surrounding him at the time of the fatal act must be such as to have created in his mind a reasonable belief, well founded and honestly entertained, of his own present and immediate imminent peril, and of an urgent necessity to take the life of his assailant, as the only alternative of saving his own, or of preventing the infliction of great bodily harm; and of the existence of these facts the jury must be the judge. *Ib.* 329.
47. *Personal property taken without criminal intent; law of recapture.* Where personal property is converted, or taken possession of in such manner as to constitute merely a civil trespass, without any criminal intent, it is not lawful to recapture it by the exercise of any force which would amount even to a breach of the peace, much less a felonious homicide. *Ib.* 329.
48. *The right to take life to prevent the commission of a felony; limitation to rule.*—Although it has often been stated, in general terms, by text writers, and in many well considered cases, that one may “oppose another who is attempting to perpetrate *any felony*, to the extinguishment, if need be, of the felon’s existence,” the rule as thus stated is neither sound in principle, nor supported by the weight of modern authority; but the safer view is, that the rule does not authorize the killing of persons attempting *secret felonies*, not accompanied by force. *Ib.* 329.
49. *Same; when the killing of one attempting to commit larceny of a horse, not justifiable.*—Where, on the trial of a prisoner for murder, one of the defenses relied on was, that he was in pursuit of the deceased, at the time of the homicide, for the purpose of recapturing a horse, which had been stolen from him by the deceased, and that the killing was necessary to a recovery of the horse, it being shown that the alleged larceny, if it occurred at all, was committed in the day time, and it not being shown that the prisoner was unable to obtain his redress at law,—*held*, that the refusal of the court to charge the jury, at the prisoner’s request, that if the horse was feloniously taken and carried away by the deceased, and there was an apparent necessity for killing the deceased, in order to recover the horse, and prevent the consummation of the larceny, the homicide would be justifiable, is free from error, although the larceny of a horse, without regard to value, is a felony under the statute. *Ib.* 329.
50. *Right of pursuit and recapture of stolen property, as applicable to law of homicide.*—If, however, the horse was in fact stolen by the deceased, the prisoner, or any other person, without informing the deceased of his purpose, had the right to pursue him for the purpose of arresting him, and of recapturing the stolen property; and, if resisted, had the right to repel force by force, and was not required to give back or retreat; and if, under such circumstances, the deceased was killed, the homicide would be justifiable. *Ib.* 329.
51. *Same.*—If, in such case, the prisoner’s purpose was honestly to make pursuit, he would not for this reason be chargeable with the imputation of having wrongfully brought on the difficulty; but the

CRIMINAL LAW—*Continued.*

- law would not permit him to resort to the pretense of pursuit, as a mere colorable device, beneath which to perpetrate crime. *Ib.* 329.
52. *Character of deceased; when a vital issue.*—While “no one can, without lawful excuse, kill a blood-thirsty ruffian any more than he can the most orderly citizen;” yet, an overt act done by the former may reasonably justify prompter action, as a necessary means of self-preservation, than if done by the latter; and hence, in all cases of homicide, in which an issue of self-defense properly arises, the character of the deceased is a vital issue. *Ib.* 329.
- 52a *Insanity as defense for crime; burden of proof.*—When insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury, by a preponderance of the evidence; and a reasonable doubt of the defendant’s sanity, raised by all the evidence, does not authorize an acquittal. (BRICKELL, C. J., *dissenting.*) *Ford v. State*, 385.
53. *Insanity fitful or occasional in character; not presumed to be continuous.*—It is only insanity of a chronic or permanent nature which, on being proved, is presumed to continue; there is no presumption that fitful and exceptional attacks of insanity are continuous. *Ib.* 385.
54. *Same; offense presumed to have been committed in lucid interval.*—Where an insane person “has lucid intervals, the law presumes the offense of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper.” *Ib.* 385.
55. *Voluntary drunkenness no excuse for crime.*—While voluntary drunkenness may some times operate to rebut the existence of malice, so as to reduce the grade of homicide, or other crime of which malice is a necessary ingredient, and, in many instances, a man may be so drunk as to be incapable of forming or entertaining any specific intention at all; yet, it can not be said, in any proper sense, that intoxication excuses the crime committed under its influence, or that the defendant should on that account be entirely acquitted of guilt. *Ib.* 385.

See CHARGE TO JURY.

Sub-title, EVIDENCE, *supra*.

VII. GAMING.

See CHARGE TO JURY.

VIII. INDICTMENT.

56. *Indictment; exceptions created by a proviso to an act need not be negatived.*—Where a proviso or exception is embodied in a separate clause of a penal statute, and not in the clause creating the offense, it is not necessary that an indictment founded on the statute should negative the proviso or exception. *Grattan v. State*, 344.
57. *Same; when indictment in language of the statute insufficient.*—While the general rule is, that where a new offense is created by statute, an indictment describing the offense in the language of the statute, or in words conveying the same meaning, is good, this is not sufficient, if such indictment fails to allege the fact, “in the doing or not doing of which the offense consists.” *Ib.* 344.
58. *Indictment under act prohibiting the sale, etc., of cotton in Lowndes and other counties; what it should aver.*—An indictment under the act approved February 1st, 1879 (Pamph. Acts, 1878-9, p. 216), charging the defendant with unlawfully and knowingly buying cotton in the seed in Lowndes county, one of the counties named in the act, should allege either the name of the owner of the cotton

CRIMINAL LAW—*Continued.*

- purchased, or the name of the person from whom the purchase was made. Either averment would be sufficient to obviate any objection based upon a want of certainty in the statement of the offense. *Ib.* 344.
59. *Same; when insufficient.*—Hence, an indictment in such case, which alleges neither the name of the owner of the cotton, nor the name of the person from whom it was purchased, is fatally defective. *Ib.* 344.
60. *Sufficiency of indictment; several offenses stated disjunctively in same count.*—It is no ground of objection to an indictment found under section 4369 of the Code of 1876, as amended (Pamph. Acts, 1878–9, p. 63), prohibiting the trading in designated farm products between sunset and sunrise, that the several offenses denounced by the statute are stated in the same count disjunctively, or in the alternative; being of the same character, and subject to the same punishment, they may be, under the express provisions of the Code (§ 4798), joined in the same count. *Russell v. State*, 348.
61. *Indictment for trading in farm products between sunset and sunrise; necessary averments of.*—An indictment under this statute, which charges that the defendant “did buy, sell, receive, barter, or dispose of” a designated quantity of seed cotton “after the hour of sunset and before the hour of sunrise of the next succeeding day against,” etc., is fatally defective in failing to aver the name of the person to whom the defendant sold, bartered or disposed of the cotton; and also in failing to aver the ownership of the cotton bought or received, or the name of the person from whom it was bought or received, or that the names of such persons were to the grand jury unknown. *Ib.* 348.
62. *Burglary and larceny; when conviction may be had for either under indictment for burglary.*—In burglary, if the intent to steal has been consummated, if there is not only the criminal breaking and entry, but an actual felonious taking of the goods of another, the burglary and larceny are so closely connected and so combined, that they may be charged in the same count in the indictment; and in that form the indictment is regarded as charging but one offense, a combined offense, or rather burglary committed in a particular manner; and upon it there may be a conviction of either burglary or larceny; or there may be a general conviction, though but one punishment can be imposed. *Gordon v. State*, 315.

See *infra*, sub-title, PROFANE SWEARING.

IX. JURORS AND JURY.

63. *Practice in excusing jurors summoned to try a capital case.*—“Without deciding it to be error to excuse a juror from service before a capital felony is regularly called for trial, when he is shown to be exempt by statute,” the court expresses the opinion, “that the safer practice is not to excuse any juror in advance of the trial, until he claims the privilege of such exemption on his name being regularly drawn.” *Sylvester v. State*, 17.
64. *Oath to jury; when insufficient.*—The settled rule is, that where the judgment-entry in a criminal case purports to set out the full oath administered to the jury trying the cause, it must express every essential element or ingredient of the oath, as prescribed by statute (Code of 1876, § 4765); and hence, a recital in such judgment-entry that the jury were “sworn and charged well and truly to try the issue joined,” omitting the words, “and a true verdict render according to the evidence, so help you God,” is fatally defective. *Storey v. State*, 329.
65. *Same; when insufficient.*—But a recital in the judgment-entry that the

CRIMINAL LAW—*Continued.*

"jury were duly sworn," or "were sworn according to law," is sufficient; and "it is the safer practice for the *nisi prius* courts to pursue." *Ib.* 329.

66. *Oath of petit jury in criminal case; when insufficient.*—An oath administered to a petit jury in a criminal case to "well and truly the issue joined to try and a true verdict to render," is insufficient, in that it fails to require the jury to render their verdict "according to the evidence;" and it will not sustain a judgment of conviction on appeal. *Allen v. State*, 5.

See CHARGE TO JURY.

X. LARCENY.

67. *Larceny; what constitutes asportation.*—Where, on the trial of a defendant indicted for the larceny of a hog, the only evidence of an asportation tended to prove that the defendant shot the hog, and cut its throat, these injuries resulting in death, a charge instructing the jury, that the "least removal of the hog by the defendant after he shot and killed it, would be an *asportavit* in law; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed the hog, and then took hold of it and cut its throat, that would constitute a taking and carrying away in the eyes of the law," is free from error. *Croom v. State*, 14.
68. *Declaration of defendant; when inadmissible.*—It is not competent for a defendant indicted for larceny, and who defends under a claim of ownership, to introduce in evidence a declaration made by him while in possession of the property alleged to have been stolen, showing how his asserted right or claim originated. Such declaration is no part of the *res gesta*, but merely a recital of a past transaction. *Allen v. State*, 5.
69. *Stolen goods carried into another county; when conviction may be had therein.*—Larceny not changing the ownership or lawful possession of the stolen property, if the thief carry it into another county, or have it so carried, and there exercise dominion over it, this constitutes larceny in such county, and the thief may be indicted and convicted therein. *Whizenant v. State*, 383.

See *infra*, sub-title, PLEAS AND DEFENSES.

Sub-title, EVIDENCE, *supra*.

XI. LIMITATIONS, STATUTE OF.

70. *Judgment-entry when new indictment ordered to be preferred for variance or other defect; what should contain.*—When, under the Code, a new indictment is ordered to be preferred against a defendant—either for a variance, under section 4817, or on account of an insufficient description, or other defect, under section 4819, the judgment-entry should show, in order to prevent the running of the statute of limitations, under the provisions of section 4820, that a *nolle prosequi* was entered, or that the indictment was quashed, or otherwise disposed of; and if a *nolle prosequi* is entered for a variance, the entry should further show that the order was made before the jury retired. *Coleman v. State*, 312.
71. *Same; when insufficient.*—Hence, a judgment-entry reciting that there was "a misdescription in the indictment of matter therein stated," and that the defendant had refused to allow it to be amended, "so as to conform to the correct description," and holding the defendant to bail in a stated sum "to await any new indictment that may be found against him for the same offense," without more, is insufficient to prevent the running of the statute of lim-

CRIMINAL LAW—*Continued.*

itations, whether the order was made under section 4817, or under section 4819 of the Code. *Ib.* 312.

72. *Same; when defendant entitled to an acquittal.*—If, in such case, the bar of the statute of limitations is complete, the defendant is entitled to an acquittal, unless the judgment-entry is amended *nunc pro tunc*, curing the defect. *Ib.* 312.

XII. PLEAS AND DEFENSES.

73. *A crime can not be split up into two or more distinct offenses.*—A single crime can not be split up, or subdivided into two or more indictable offenses; and hence, if the State, through its authorized officers, elects to prosecute a crime in one of its phases or aspects, it can not afterwards prosecute for the same criminal act under color of another name. *Moore v. State*, 307.
74. *Plea of former conviction; when good.*—To an indictment for an assault with an intent to murder, a plea of former conviction of an assault and battery with a stick in the county court, based on the same criminal act, is good, although the offense charged in the indictment is a felony, and the offense for which there was a former conviction is merely a misdemeanor. *Ib.* 307.
75. *Same; when vitiated for fraud.*—If, however, the former conviction was procured by the fraud, connivance or collusion of the defendant, this would vitiate the conviction, and it would not be a bar to the indictment. *Ib.* 307.
76. *Same; plea need not negative fraud.*—The defendant is not required to negative in his plea the existence of such fraud, connivance or collusion; but, if it exists, the State must set it up by replication to the plea. *Ib.* 307.
77. *Sections 4629–30 of the Code; when provisions not applicable.*—The provisions of sections 4629–30 of the Code of 1876 have no application in this case, as they only authorize the abatement of a prosecution for a misdemeanor, pending in the circuit court, on sworn plea of the defendant, averring that the county court had acquired prior jurisdiction, without his “agency, request, participation, or authority,” and that the prosecution is still pending in the county court, and on proper proof supporting the plea. *Ib.* 307.
78. *Plea of former acquittal or conviction; sufficiency of.*—The test of the sufficiency of a plea of former conviction or former acquittal is, whether the facts averred in the second indictment, if found to be true, would have warranted a conviction upon the first. The two offenses must be the same, identical in law and in fact, or an acquittal or conviction of the one is not a bar to a prosecution for the other. *Gordon v. State*, 315.
79. *Same.*—However closely connected in point of fact the offenses may be, if, in contemplation of law, they are distinct and different offenses, there is no protection against a prosecution for both, except in cases in which the State elects to prosecute for them as but one offense. *Ib.* 315.
80. *Same; when former conviction or acquittal of larceny no bar to an indictment for burglary.*—Where an indictment for burglary charges that the breaking and entry were done *with an intent to steal*, a former conviction or acquittal of the larceny which, it is averred, he intended to commit, when he committed the burglary, will not constitute a bar to the indictment for the burglary; for upon the former trial he could not have been convicted of the offense now charged, nor would the evidence which would support a conviction on the present indictment have availed for a conviction on the first. *Ib.* 315.
81. As to pleas of Self-defense, and Insanity, see sub-title, HOMICIDE, *supra*.

CRIMINAL LAW—Continued.

XIII. PROFANE SWEARING.

82. *Public profane swearing indictable at common law.*—Public profane swearing, when it takes such form, and is uttered under such circumstances as to constitute a public nuisance, is an indictable offense under the common law; but the single utterance of a profane word is not *per se* indictable, at least when not spoken in a loud voice, or with repetitions. *Goree v. State*, 7.
83. *Same.*—It is not necessary to make out the offense of public profane swearing, that the language used should be heard by a large portion of the community; but it is sufficient, if three or four persons were present and heard the words uttered. *Ib.* 7.
84. *Same; sufficiency of indictment.*—Public profane swearing being a common law offense, and no form of indictment being prescribed by the Code, the indictment must aver every material constituent of the offense, time and venue alone being excepted. *Ib.* 7.
85. *Same; when indictment insufficient.*—An indictment for such offense which fails to charge that the profane words were uttered in the presence or hearing of any one, but merely that they were *publicly* uttered, is insufficient. "According to the best approved precedents, the language is usually charged as having been uttered in the presence and hearing of divers persons, citizens or subjects, as the case may be." *Ib.* 7.

XIV. PROHIBITION.

86. *Local statute prohibiting sale of intoxicating liquors; when sale not violative of.*—A sale to be in violation of a local statute, making it unlawful to sell, etc., spirituous, vinous, or malt liquors, within a designated locality, must be made in that locality; and hence, a sale, passing the title, made in a different locality, where the liquor is set apart and delivered to an express company, to be by it transported into the territory covered by the statute, and there delivered to the buyer, is not within the words or spirit of the statute, although the liquor is sent "C. O. D.," by instructions of the buyer, and he pays the price therefor on delivery. *Pilgreen v. State*, 368.

XV. STATEMENT BY DEFENDANT.

87. *Its nature.*—The statement of facts which a defendant in a criminal case is authorized to make in his own behalf, under the act approved December 2, 1882 (Pamph. Acts, 1882-3, p 4), being in the nature of evidence, and submitted to the jury in that character, it is subject to the ordinary intrinsic tests of credibility governing the sworn testimony of witnesses; and hence, the jury, in determining its weight, may consider the character of the defendant, if legitimately in evidence, his demeanor on the stand, his intelligence, the accuracy of his memory, the inherent probability of his statement, its consistency with itself and the other circumstances of the case, or the lack of these elements of veracity, together with other considerations liable to affect the credibility of the statement, or afford any reasonable presumption of its probability or improbability. *Blackburn v. State* 319.
88. *What weight entitled to.*—While the jury can not arbitrarily or capriciously discard the statement, any more than they can technical evidence, it is entitled only to such weight, in influencing their verdict, as they may, in good conscience and justice, see fit to give it; and it is clearly not necessary that the statement should be corroborated by other independent testimony, in order to authorize the jury to believe it. *Ib.* 319.
89. *When charge upon weight of, erroneous.*—A charge requested by a

CRIMINAL LAW—Continued.

- defendant in a criminal case, embodying an instruction to the jury, that his statement "is to be given no less credence on account of its not being made under oath," being an improper infringement upon the province of the jury, was, for that reason, properly refused. *Ib.* 312.
90. *Act allowing defendants in criminal cases to make statements construed.* By the act of December 2, 1882 (Pamph. Acts, 1882-3, p. 4), authorizing defendants in criminal cases to make statements in their own behalf, the legislature did not intend to allow them to become witnesses, or their statements to become evidence. *Chappell v. State*, 322.
91. *How should be considered by jury.*—The jury can not, however, wantonly and capriciously disregard a statement made by a defendant under the statute in their deliberations; but they must consider it in connection with the evidence in the cause, and give to it such weight, and only such weight, as its own inherent force, or corroborating proofs authorize. *Ib.* 322.
92. *Defendants can not be examined or cross-examined.*—Defendants in criminal cases can not be examined by their counsel or cross-examined by the State, when they make their statements under the statute. *Ib.* 322.
93. *Defendants can not be impeached.*—While the statements may be subjected to all the tests for ascertaining truth, which spring out of the proof in the cause, such as the consistency or probability *vel non* of the statements, the defendants' manner in making the statements, and the interest they must feel in the result, the defendants can not be impeached, as witnesses may be, by proof of bad character, by cross-examination, or by any other proof of extrinsic facts, introduced for such purpose. (SOMERVILLE, J., not expressing an opinion as to the right to impeach defendants by proof of bad character.) *Ib.* 322.
94. *Its nature.*—While the statement made by a defendant in a criminal case is not technically evidence, in the broadest acceptation of the word, it is certainly "in the nature of evidence," is made to the jury for their consideration, and is to be weighed by them, in connection with all the evidence, in determining the issue of guilt or innocence. *Beasley v. State*, 328.
95. *May be commented on by counsel.*—It is error for the primary court to refuse to permit the defendant's counsel, in addressing the jury, to comment on such statement. *Ib.* 328.
96. *Defendant not subject to cross-examination.*—When a defendant in a criminal case makes a "statement" under the statute, he is not subject to cross-examination by the State; and it is a reversible error for the primary court to allow such cross-examination against his objection. *Whizenant v. State*, 333.
97. *Can not state motive or belief.*—An uncommunicated belief, motive, or intention can not be stated by a defendant in a criminal case in the statement which he is allowed to make under the statute. *Burke v. State*, 377; *Whizenant v. State*, 333.

XVI. TRADING IN FARM PRODUCTS BETWEEN SUNSET AND SUNRISE.

98. *Statute construed.*—Under the statute prohibiting the selling, buying, etc., of the agricultural products therein designated after the hour of sunset and before the hour of sunrise of the next succeeding day (Code, § 4369), the want of the knowledge or consent of the owner of the products so prohibited to be bought, sold, etc., is not an element of the offense; and hence, his knowledge of the act, or consent thereto, when done by another, is no defense to a prosecution under the statute. *Gilliam v. State*, 10.

CRIMINAL LAW—*Continued.*

See sub-title, INDICTMENTS.

AGENCY, 12.

XVII. TRIAL AND INCIDENTS.

99. *When record must show presence of defendant in capital case.*—On appeal in a capital case, the failure of the record to show affirmatively, that the defendant was personally present in court when the day for his trial was fixed, and the order made for summoning a special venire, is a reversible error. *Sylvester v. State*, 17.
100. *When defendant's presence will not be presumed, or error waived.* In such case this court will not presume from the mere silence of the record, that the defendant was present when the day for his trial was fixed, and the order made for summoning a special venire; nor will it be held that the error was waived by his proceeding to trial without objection. *Ib.* 17.

See sub-title, JURY AND JURORS, *supra*.

XVIII. VERDICT AND JUDGMENT.

101. *When judgment in criminal case will not support an appeal.*—Where, on the trial of a misdemeanor, the judgment-entry recites a verdict of guilty and the amount of the fine assessed against the defendant by the jury, but fails to show that the court pronounced judgment on the verdict, an appeal will not lie to this court, although the entry contains a judgment confessed by the defendant and his sureties for the fine and costs. *Ayers v. State*, 11.
102. *Hard labor for costs; when sentence sufficient.*—Where the record does not show that the bill of costs includes any costs, for the payment of which the defendant can not be legally imprisoned, a judgment of conviction, specifying the exact duration of the additional hard labor imposed for costs, is sufficient. *Croom v. State*, 14.
103. *Indictment for murder; verdict not specifying degree of homicide, insufficient.*—Under an indictment for murder, a general verdict of guilty, which does not find the degree of the homicide, will not support a judgment of conviction. *Storey v. State*, 329.
104. *Sentence to hard labor or imprisonment on conviction for misdemeanor; how avoided by defendant on taking appeal.*—The statute (Code, §§ 4454-5), expressly provides that if the fine and costs are not paid, or a judgment confessed with sureties, the alternative sentence to hard labor or to imprisonment must be pronounced; and if the defendant, in such case, has reserved questions for the consideration of this court, he may prevent the imposition of the alternative sentence by a confession of judgment with proper sureties; for if the judgment of conviction is reversed, the judgment by confession, having no foundation to rest on, falls with it. *Burke v. State*, 377.
105. *Confession of judgment for fine and costs in case of misdemeanor; a civil liability.*—A confession of judgment by sureties for a defendant in a prosecution for a misdemeanor is a civil proceeding in the name of the State for the use of the county in which the crime was committed and prosecuted, and imports a civil liability—a mere promise to pay money, evidenced by the judgment thus confessed. *The State for use, etc. v. Allen*, 543.

CULLMAN COUNTY.

1. *County court of Cullman county; what jurisdiction and powers conferred by act establishing.*—The act entitled "An act to establish an inferior court for Cullman county," approved March 1st, 1881

CULLMAN COUNTY—*Continued.*

(Pamph. Acts, 1880-81, p. 211), providing that "said court shall have original jurisdiction, concurrent with the circuit court, of all misdemeanors committed in Cullman county," but not prescribing the modes of procedure by which such criminal jurisdiction shall be exercised, nor conferring on the court the power to organize grand juries, nor authorizing the transfer to it for trial of indictments pending in the circuit court, must be construed so as to carry with the express grant of jurisdiction thereby conferred, by necessary implication, the use of all process and modes of procedure, authorized by law, and applicable to county courts under the general statutes, in the exercise of similar jurisdiction by them. *Ex parte Alabama, in re Merlet*, 371.

DAMAGES.

See AUDITOR, 8.

CONTRACTS, 8-10.

TRESPASS.

DEEDS.

1. *Delivery of deed; what evidence sufficient to establish.*—It may be regarded as settled in this State, that when a paper purporting to be a deed is shown to have been signed by the grantor, to have been acknowledged and duly certified by a proper officer, and recorded in time in the office of the judge of probate of the county in which the lands lie, and there is no other evidence to weaken the force of these facts, this is sufficient proof of complete execution by delivery, although there is no direct proof of that fact. *Alexander v. Alexander*, 295.
2. *Same; whether presumption of delivery overturned, quære.*—But where the testimony also shows that when the deed was acknowledged and certified, the grantor took possession of it, and sent it to the registration office, with directions that, when recorded, it should be returned to him, which was done,—*quære* whether this would not overturn the *prima facie* presumption of delivery which would otherwise arise from its acknowledgment and record, and whether this, unexplained by other testimony, would not show that there was, in fact, no delivery. *Ib.* 295.
3. *Same; how ascertained when testimony indeterminate or ambiguous.* The question of the delivery *vel non* of a deed, when the testimony is indeterminate or ambiguous, is, and must be a question of intention with which the ambiguous or disputable act or acts were done or performed. *Ib.* 295.
4. *Same; how declaration of grantor in reference to, should be considered.*—Declarations and admissions of a grantor touching the delivery of a deed, on a question of delivery *vel non*, should be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them. *Ib.* 295.
5. *Proof of handwriting of subscribing witness to deed; when inadmissible.*—For the purpose of proving the execution of a deed, evidence of the handwriting of a subscribing witness is inadmissible, when it is shown that the witness is within the State. To authorize such evidence, it is necessary to show that the subscribing witness is dead, is out of the State, or is, for some reason, incompetent to testify. *Allred v. Elliott*, 224.
6. *Execution of deed; proof of.*—Where the grantor in a deed which had been lost, the execution and contents of which were sought to be proved, testified that he executed the deed in the presence

DEEDS—*Continued.*

- of two subscribing witnesses, naming them, one of whom was a woman, the testimony of a witness, who had been named by the grantor as the other subscribing witness, that a woman who was absent from the State signed the deed as a witness, is competent, although it is shown that the witness testifying could neither write nor read writing. His inability to write or read writing might impair the weight of his testimony, but it would not render the testimony illegal. *Ib.* 224.
7. *Deed to land; execution of.*—A deed to land, executed by a person who writes or signs his name, is valid, if it is attested by one witness who is able to write, and does write his name. *Ib.* 224.
 8. *Consideration of deed in contest between grantee and creditors of grantor; rule as to admissibility of parol evidence.*—The rule that the consideration clause of a deed can not be varied by parol evidence in a contest between the grantee and the creditors of the grantor, merely prohibits parol proof of a consideration of a different kind from that expressed in the deed—as proof of a valuable consideration when a good consideration is expressed, or proof of a good consideration when a valuable consideration is expressed; it does not restrict the grantee to proof of the precise consideration recited in the deed, but he may show any consideration of the same kind. *Pique, Manier & Hall v. Arendale, 91.*
 9. *Same.*—It is competent for a grantee in a deed which recites a moneyed consideration, in a contest between him and a judgment creditor of the grantor, to show in support of the deed, that the true consideration was partly the payment of a debt or legal liability due from, or resting upon the grantor, and partly a promise on the part of the grantee to pay the grantor a specific sum of money. *Ib.* 91.
 10. *Same; when not regarded with suspicion.*—The fact that the true consideration of a deed was the payment of a debt or legal liability due from or resting upon the grantor, and the grantee's promise to pay the grantor a stated sum of money, while the recited consideration was money paid, does not of itself constitute a badge of fraud, or cause the transaction to be regarded with suspicion in a contest between the grantee and a judgment creditor of the grantor. *Ib.* 91.
 11. *When deed to land not void on its face for uncertainty.*—A sheriff's deed to a lot of land in a city which was sold under execution, and which is described in the deed as "part of lot seventeen, fronting on Gallatin street fifty feet, extending eastwardly seventy-three feet, as the property of said Isaac Jamison," is not, on its face, void for uncertainty, as it might be shown by extrinsic proof that the entire front of the lot on Gallatin street was only fifty feet; or that Jamison, at the time of the execution of the deed, owned a defined part of the lot fronting on said street, measuring fifty feet, and known "as the property of said Isaac Jamison."—*Bernstein v. Humes, 260.*
 12. *When deed void for uncertainty.*—But when such deed is considered in connection with extrinsic proof, showing that lot seventeen fronts on Gallatin street about one hundred and forty-seven feet, all of which had been conveyed to Jamison except about twenty-five feet, none of which is shown to have been disposed of by Jamison at the date of the execution of the deed; and it is not shown that the fifty feet front had ever been separated from the residue, or that there was any identification of any fifty feet front known "as the property of said Isaac Jamison," the property is not sufficiently identified, and the deed is void for uncertainty. *Ib.* 260.
 13. *Identification of land in deed by extrinsic proof.*—When identifica-

DEEDS—*Continued.*

tion of land in a deed is sought to be established by extrinsic proof, it must be shown by proof of facts—facts still existing, or which are shown to have once existed. Opinion or conjecture as to the land intended to be conveyed will not do. *Ib.* 260.

14. *Sale of lands by personal representative; when title of the heirs or devisees not divested.*—Under a sale of lands by a personal representative, made in pursuance of a decree of the probate court, the title of the heirs or devisees is not divested, until a conveyance is executed by the order of the court; and hence, a conveyance of the lands, executed by the personal representative without such order, is wholly inoperative in a court of law. *Landford v. Dunklin et al., Adm'rs*, 594.
15. *Construction of deed; what not a condition precedent.*—C., having executed a mortgage to S. on a tract of land owned by him, afterwards executed a deed conveying the lands to his children, reciting a valuable consideration, and containing covenants of warranty, in which was this clause: "Now, this conveyance is made to the parties of the second part, and to their heirs and assigns, absolute and in fee simple, with and on the following conditions, and with the knowledge and understanding of them as follows:" Then, after a statement of the execution and existence of the mortgage to S. and of the note secured thereby, the deed proceeds: "Now, on payment of said note and full satisfaction of this indebtedness, made by either the party of the second part, then this conveyance shall be absolute in fee simple, and in full force and effect. Until said note is fully satisfied, the land conveyed to S. for the purpose of securing the payment of the same, is and shall remain subject to the conditions and purposes mentioned in the conveyance." The deed further provides that "upon the payment of said note by the party of the first part, or by the parties of the second part, all the right, title and interest in and to the above described land shall vest in the parties of the second part." *Held*,
 - (a) That the term *conditions*, as used in the deed, can not be construed in its technical, legal sense, but in its generic sense, to denote the predicament or *status* of the title.
 - (b) That the payment of the mortgage debt to S. was not made a condition precedent to the vesting of title in the grantees; but the effect of the deed was to convey the lands to the grantees, subject to the incumbrance created by the mortgage. *Dunlap, Adm'r v. Mobley, Adm'r*, 102.

See ADVERSE POSSESSION.

CHANCERY, 4, 37-40.

FRAUDULENT CONVEYANCES.

INFANT.

DISCONTINUANCE.

1. *When erroneous order of removal of a prosecution pending in a State court to Federal court does not operate a discontinuance.*—Where a State court, on the application of a defendant in a criminal case pending therein, founded on Section 641 of of the U. S. Rev. Stat., erroneously entered an order removing the cause to the Federal court, and afterwards that court declined to take jurisdiction and remanded the cause to the State court, the failure of the latter court to proceed in the prosecution, or to enter continuances or other orders in the cause, while it was awaiting disposition in the Federal court, and until that court made the order of remandment, does not work a discontinuance. *Ex parte The State*, 363.

DIVORCE.

See DOWER, 1.

DOWER.

1. *When not barred by divorce.*—Under the statutory provisions of this State, a divorce from the bonds of matrimony, obtained by the husband on the ground of voluntary abandonment, does not bar the surviving widow of her right of dower. *Williams, Adm'r v. Hale, 83.*
2. *Statutory separate estate to be computed in estimating.*—The statute requiring that, in the computation of the widow's dower and distributive share in the deceased husband's estate, the value of her separate estate shall be deducted (Code, 1876, § 2715-16), refers to an estate created by the constitution and statutes, and not to an equitable estate, an estate which is made separate by terms of its creation. *Harris v. Harris, 536.*
3. *Same; investment of moneys, the wife's statutory separate estate, by the husband.*—The husband, in investing money, the statutory separate estate of the wife, may elect, the claims of creditors who had previously supplied the family with necessities not being involved, whether the investment shall be made in the name of the wife, continuing the character of the estate, or whether the investment shall be made in the name of himself, or of a stranger, as her trustee, to hold for her sole and separate use; and when such investment is made in the latter way, the value of the property thereby purchased, and held by her at the time of the husband's death, can not be computed in ascertaining her dower interest and distributive share in his estate. *Ib. 536.*
4. *Same; transfer of policy of life insurance by the husband to the wife; character of estate thereby created.*—A transfer by the husband to the wife of a policy of insurance on his life, payable to him, as a gift, creates in the wife an equitable separate estate; and, she having collected the insurance money after his death, the amount thereof can not be computed, in estimating her dower interest and distributive share in his estate. (This case distinguished from *Williams v. Williams, 64 Ala. 405.*) *Ib. 536.*

See FRAUDULENT CONVEYANCES.

EJECTMENT.

1. *When outstanding title in a stranger a defense.*—A party in possession of land, claiming under a purchaser at a sale made by a transferee of a mortgage under a power contained therein, can successfully defend an action of ejectment brought by the mortgagor for the recovery of the land, although the transfer of the mortgage and the sale under the power were so irregular as to convey only the mortgage interest, and not the legal title. In such case, the defendant is not a naked trespasser, but holds possession under claim, if not color of right; and so holding, it is enough to defeat the plaintiff's action for him to show an outstanding title in a stranger. *Snedecor v. Freeman, 140.*
2. *Charge of court; presumption of title to land.*—In an action of ejectment a charge instructing the jury, that "prior possession for several years, accompanied with the erection of valuable improvements and other acts of ownership, raises a presumption of title," asserts a correct legal principle; and if its tendency is to mislead, this calls for an explanatory charge, and is no ground for reversal. *Allred v. Elliot, 224.*
3. *When right of possession in mortgagor subject to sale under execution; title of purchaser.*—Where a deed of trust conveying lands, executed to secure a series of bonds having several years to run,

EJECTMENT—*Continued.*

after reserving the possession and enjoyment of the premises in the grantor, provided that before the trustee could enter and take possession, there should be a delay of sixty days after default, a demand of payment and a request from the holder of the bonds; and afterwards default was made, but the trustee did not take the steps necessary to entitle him to enter and take possession,—*held*, that the right of possession and enjoyment in the grantor was a valuable interest, a legal estate, which was subject to levy and sale under execution, and the purchaser of that interest acquired such an estate as would support ejectment. *Bernstein v. Humes*, 260.

4. *When deed of trust not an outstanding title in a stranger.*—In such case the deed of trust is not such an outstanding title in a stranger as will defeat a recovery in ejectment by a plaintiff claiming under the purchaser at execution of sale. *Ib.* 260.
5. *Right of personal representative to bring ejectment.*—The effect of our system, subjecting lands descended or devised to administration, rendering them liable to the payment of the decedent's debts, and conferring upon the personal representative power to rent them, and to intercept the descent, or defeat the devise, by sale under the order of the probate court, is, that the personal representative is entitled to maintain any action at law for their recovery that the heir or devisee can maintain; the right of the heir or devisee yielding to the right of the personal representative when he elects to assert it. *Landford v. Dunklin, et al., Adm'rs*, 594.
6. *When administrator de bonis non may maintain ejectment.*—Where lands were sold by an administrator in chief under a valid order of the probate court, and the purchase-money was afterwards paid, but no report of its payment was made, and no order was entered directing a conveyance to the purchaser, the administrator executing a deed without such order, the legal title to the lands did not thereby pass to the purchaser, and an administrator *de bonis non* can maintain ejectment against the purchaser for the recovery thereof. *Ib.* 594.

EQUITY.

See CHANCERY.

ERROR AND APPEAL.

1. *Finding of facts by county court of Hale; effect of on appeal.*—When a criminal case is tried in the county court of Hale county, without the intervention of a jury, under the statute, this court will not revise the findings of fact by the judge trying the case, and reverse the judgment of that court thereon, unless it is plainly erroneous. *Gilliam v. State*, 10.
2. *Trial of issues of fact by the court; special finding, when open for review in appellate court.*—Where, by agreement of parties, a jury is waived in a civil case, and the issues of fact are tried and determined by the court under the statute (Code, §§ 3029–31), and, at the request of one of the parties, the court makes a special finding, the sufficiency of such finding is open for review on appeal to this court. *Betancourt v. Eberlin, Adm'r*, 461.
3. *Rule as to review of chancellor's findings on facts.*—The rule established in this court in reviewing the findings of the court of chancery on facts, is to affirm, unless clearly convinced of error; but if so convinced, to reverse. *Eureka Company v. Edwards*, 248.
4. *When findings of judge of probate will not be disturbed.*—Where, in a proceeding before the judge of probate for authority to erect a mill-dam, after the inquest of the jury had been returned to the

ERROR AND APPEAL—*Continued.*

- judge of probate, he heard other evidence introduced by both the applicant and contestant before making an order for the erection of the dam, this court will not, on appeal, revise and reverse the conclusions and findings of the judge, unless they are manifestly unsupported by the evidence. *Folmar v. Folmar*, 136.
5. *Effect of findings of primary court on questions of fact when presented for revision on appeal.*—Where the primary court is charged with the duty of ascertaining and determining matters of fact dependent upon the *viva voce* examination of witnesses, without the aid of a jury, this court will, on appeal, attach to its findings the force and effect of the verdict of a jury, which can not be disturbed, unless it is plainly erroneous—opposed to all the evidence; but this rule is not applied to the decision of a chancellor, based upon evidence wholly in writing, which, in the same form, and under the same circumstances, is presented to this court. *McWilliams v. Phillips*, 80.
 6. *Presumption in favor of judgment or decree of primary court.*—Whether a judgment or decree is assailed, on appeal, for error of law, or error of fact, a presumption of correctness prevails until it is removed by the party complaining of error; and to justify its reversal, this court must see, and see clearly, that it is wrong—that error of law or of fact infects it. *Ib.* 80.
 7. *Presumptions on appeal in favor of rulings of primary court.*—The rule is, that this court can not presume anything, not shown by the record, as a ground for reversing the ruling of the primary court; and when an affirmative charge is given, which would be correct on any state of facts, it will be presumed that there was testimony which authorized the charge, unless the record affirmatively shows the contrary. *Alexander v. Alexander*, 295.
 8. *Same.*—On appeal this court will presume every thing in favor of the correct ruling of the primary court, which the record does not affirmatively show to be otherwise. *Moses, Blum & Weil v. Dunham, Buckley & Co.* 173.
 9. *When proper pleadings presumed on appeal to have been filed.*—After the parties, without objection for the want of appropriate pleadings, have proceeded to a trial upon the merits in the primary court, this court will presume, on appeal, that the proper pleadings were filed or waived. *Curtis v. Daughdrill*, 590.
 10. *Rule on appeal, where bill is dismissed.*—If the chancellor dismisses complainant's bill, either assigning no reason, or placing the decree on a ground which is untenable, then the rule of this court, on appeal, is, to inquire whether the bill contains equity. If it be substantially wanting in equity, the decree will be affirmed, because it is right, though based on a wrong reason or ground; but if the bill contains defects which are amendable, and which were not pointed out by the ruling of the lower court, this court will reverse and remand, noting the defect, that the complainant may have the opportunity to amend. *Ryall v. Prince*, 66.
 11. *When ruling of lower court presumed to be correct on appeal.*—Where the record shows in a criminal case, that an unusual number of witnesses were summoned, but fails to show for what purpose, or at whose instance, this court can not judicially know what or how many controversies of fact were raised on the trial, and hence, can not know that witnesses were summoned in excess of what the statute requires. In such case, in the absence of a showing to the contrary, this court will indulge the presumption that the officers of the law did their duty, and that the lower court rightly overruled defendant's motion to re-tax the costs. *Murphy v. State*, 15.
 12. *When demurrer waived.*—When a demurrer to the complaint does

ERROR AND APPEAL.—*Continued.*

- not appear from the record to have been called to the attention of the lower court, or any action whatever taken thereon, it will be presumed, on appeal, to have been waived. *McNeil v. State*, 71.
13. *Judgment by consent a release of errors.*—A judgment by consent operates a release of errors, and the consent upon which it is founded can not afterwards be withdrawn and the judgment reversed at the instance of the defendants. *Ib.* 71.
 14. *Appeal from decretal order on demurrer to bill; what transcript should contain.*—On an appeal from an interlocutory decree on demurrer to a bill in equity, the transcript should only contain the bill and its exhibits, the process and service thereof, the demurrer, the decretal order thereon, the papers pertaining to the appeal, and the register's proper certificates. *Merchants & Planters Line v. Wagoner*, 581.
 15. *When judgment in criminal case will not support an appeal.*—Where, on the trial of a misdemeanor, the judgment-entry recites a verdict of guilty and the amount of the fine assessed against the defendant by the jury, but fails to show that the court pronounced judgment on the verdict, an appeal will not lie to this court, although the entry contains a judgment confessed by the defendant and his sureties for the fine and costs. *Ayers v. State*, 11.
 16. *Refusal of primary court to charge as requested; when may be revised.* The refusal of the primary court to charge as requested can and will be revised, on proper exceptions, if it is shown by the bill of exceptions that the instructions were not abstract, or that they were not addressed to the sufficiency of the evidence; and this can be shown without a recital of all the evidence which may have been introduced on the trial. *Ex parte Huckabee*, 427.

ESTATES OF DECEDENTS.

See DOWER.

EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

1. *When ward not estopped from pursuing funds invested by the guardian, by proceedings on final settlement of the guardianship.*—Where a guardian, having purchased a lot of land, partly for cash, and partly on a credit, used his ward's funds in making the cash payment, taking the title in his own name, and securing the unpaid purchase-money by mortgage on the lot, which was afterwards foreclosed under a power of sale contained therein, and purchased by one charged with notice of the trust character of the funds used in making the cash payment, the fact that the guardian on final settlement of his guardianship did not receive a credit for the funds so used, but a decree was rendered therefor against him and his sureties, which had not been satisfied, does not estop the ward from pursuing the funds into the lot in which they were invested, and from subjecting the lot to sale for the payment thereof. *Robinson v. Peabworth*, 240.
2. *Same; estoppel a reasonable doctrine.*—"Estoppel in such cases is a reasonable doctrine, and simply means that you shall not take the fruits of an illegal transaction, and afterwards set the transaction aside as illegal—in other words, that you shall not be heard to claim both under and against the same title." *Ib.* 240.

See JUDGMENTS AND DECREES.

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *Relevancy of evidence; general rule as to.*—The general rule in regard to the relevancy of evidence is, that no fact or circumstance ought to be received, which has not a direct tendency to the proof or disproof of the matters in issue; and hence, facts and circumstances which, when proved, are incapable of affording any reasonable presumption or inference touching the issues, ought to be excluded. If, however, it is apparent that the fact or circumstance has a tendency to elucidate the issue, however weak and inconclusive it may be of itself, evidence of it ought to be received, and its weight or sufficiency submitted to the jury under proper instructions from the court. *Seals v. Edmondson*, 509.
2. As to admissibility of attachment in action of trespass founded on the levy against the officer making the levy, see *Agee v. Mayer Bros.*, 88; *Rice & Wilson v. Watts*, 593.
3. *Section 3036 of the Code of 1876 applicable to suits in equity.*—Section 3036 of the Code of 1876, providing that all written instruments, the foundation of the suit, purporting to be signed by the defendant, etc., must be received in evidence, without proof of the execution, unless the execution thereof is denied by plea verified by affidavit, manifestly applies as well to courts of equity as to courts of law. *Hooper, Adm'r, v. Strahan*, 75.
4. *Admissibility of evidence.*—A statement by a witness on the trial of an action of trespass *de bonis asportatis*, that the plaintiff consented to the taking of the property by the defendant, is the assertion of a fact, and not of a mere opinion, and is, therefore, admissible evidence. The nature of such consent may be shown on cross-examination. *Street v. Sinclair*, 110.
5. *Same.*—It is always competent for a witness to give any pertinent reason for the accuracy of his recollection of a fact to which he has testified; and hence, he may state that he had consulted counsel in reference to the matter of dispute; but it is not permissible in such case for him to state what advice his counsel gave him. *Ib.* 110.
6. *Same.*—In a proceeding under the statute for authority to construct a mill-dam, a question propounded to a witness, calling for the purpose for which he examined the place where the dam was to be erected, and his answer thereto, that he examined it in reference to health, are permissible. *Folmar v. Folmar*, 136.
7. *Question calling for mental status of party, illegal.*—Where the principal is examined as a witness in his own behalf, in a suit brought against him for a trespass committed by his agent, a question propounded to him, by which he is asked whether, on being first informed of the trespass, "he approved or disapproved of it," would be irrelevant, if propounded with the view of eliciting a mere *mental* approval, unaccompanied by acts or words; and being ambiguous, and it not affirmatively appearing whether the answer would have been legal or illegal evidence, the primary court did not err in disallowing the question. *Burns v. Campbell*, 271.
8. *Trespass by mortgagor against mortgagee; what admissible.*—In an action of trespass by the mortgagor against the mortgagee and his agent for a seizure, under a power of sale in the mortgage, of mortgaged chattels, the written notice of the sale, and the sale itself of the chattels by the agent, are admissible in evidence, being merely cumulative evidence of the intention of the agent in taking the goods, and, as such, a part of the *res gestæ* of the alleged trespass, shedding light on the dominion over the goods previously asserted. *Ib.* 271.
9. *When letter by agent is admissible in action of trespass against prin-*

EVIDENCE—*Continued.*

cipal and agent.—In an action of trespass against principal and agent, for the seizure by the agent of plaintiff's goods, a letter written by the agent two days before the seizure, directed to the plaintiff, and received by him in due course of mail, and endorsements made on the envelope by the agent, evincing an unfriendly feeling towards the plaintiff, are relevant and competent, on proof of handwriting, as tending to show malice or an evil motive on the part of the agent, which may have entered into, or given color to the transaction. *Ib.* 271.

10. *Cross-examination of witness; when hostility to a party admissible.* As affecting credibility, it is permissible, on cross-examination, to inquire of a witness touching his relations to the parties, or to the subject-matter of controversy, or as to the feelings of sympathy, or partiality, or hostility which he may entertain, or may have expressed towards the party introducing him, or against the party against whom he is introduced; and also to show the degree or extent of such feelings. *Yarbrough v. State*, 376.
11. *Same; when expression of hostility admissible.*—Hence, it is error for the primary court to refuse to allow the defendant in a criminal case to ask, on cross-examination, a witness examined by the State, who had testified that his feelings towards the defendant were unkind, whether he had not said, a short time prior to the trial, to one of defendant's counsel, that he would give \$1,000 to send the defendant to the penitentiary. *Ib.* 376.
12. *Inspection of public documents in Auditor's office; when right to not forfeited.*—The inspection of public documents can not be denied merely on the ground that the party applying for it has been guilty of some past impropriety of conduct as to matters to which some documents may refer, nor because it is apprehended that the information obtained will be employed in litigation with the State; and hence, in an action by an attorney, founded on the Auditor's refusal to allow him to inspect the accounts of tax collectors whom he represented, as entered on books in the Auditor's office, the fact that the attorney had previously availed himself of his knowledge of the contents of the books in the office, however derived, to interfere with negotiations the Auditor was conducting with others, can not deprive his clients, or him as their representative, of the right to examine into their accounts. *Watson v. Brewer*, 299.
13. *Same; when reason for refusal to allow inspection, admissible to negative malice.*—Although such fact may not have been relevant as establishing a justification of the refusal, yet, the complaint averring that the refusal was malicious and with the intent to injure the plaintiff, it was admissible for the purpose of rebutting or negating malice, it having a fair and reasonable tendency to show that the defendant acted from a good motive and in good faith. *Ib.* 299.
14. *When information on which a party acts admissible in evidence.*—In such case, information of the attorney's interference with the Auditor's negotiations for settlements with others than the attorney's clients, although derived from correspondence or verbal communication with such other parties, is competent evidence for the Auditor; as the specific fact to be shown was not the truth of the information, but the fact of its communication to the Auditor, and that he acted upon it in denying the attorney access to the books of his office. *Ib.* 299.
15. *Admissibility of evidence.*—Where, in an action of ejectment, the defendant relied on adverse possession by himself and his father, under whom he claimed, as a defense, a letter written by his father to the plaintiff during the time covered by the claim of adverse possession, recognizing in the plaintiff an interest in or control

EVIDENCE—*Continued.*

over a lot of land, which the other evidence in the cause pointed to as the lot sued for, although not described or otherwise indicated in the letter, is competent evidence for the plaintiff, as tending to show that the possession relied on was not adverse. *Savery v. Moore*, 236.

16. *Same.*—Where, in such case, a witness in his deposition, after testifying that during the time covered by the claim of adverse possession, he occupied a house on the lot in controversy, which he had rented from the defendant's father, further stated that he heard defendant's father say that the lot was the property of some person, whose name he did not remember, and that he, defendant's father, had authority to build the house, and then appropriate half of the rents to his own use for the trouble of building and renting; and in a subsequent part of his testimony he used this language: "I think the name of the party to whom he [defendant's father] said the lot belonged was Alfred Moore," when the plaintiff's name is Frederick B. Moore,—*held*, that the testimony was competent evidence, as tending to rebut the alleged continuity of adverse possession on the part of defendant; and that the fact that the witness improperly designated the alleged owner of the lot as Alfred Moore, went only to the identity of the party named, which was a question of fact for the jury, there being other evidence, from which the jury might justly infer a mere mistake of name or recollection in the matter. *Ib.* 236.
17. *Same.*—As evidence tending to show such identity, the testimony of another witness is competent, which is to the effect that he had resided in the town in which the lot was situated a number of years, and knew of only one family by the name of Moore, who had ever resided in said town; that in this family there were several boys, one of whom was the plaintiff, and that no member of the family was named Alfred. *Ib.* 236.
18. As to admissibility and relevancy of evidence in criminal cases, see CRIMINAL LAW.

See AGENCY, 4, 8-10.

DEED, 6, 7.

MECHANICS' LIEN.

WAREHOUSEMEN.

II. ADMISSIONS AND DECLARATIONS.

19. *Declarations of debtor in contest between creditor and purchaser; when inadmissible.*—It is a well settled principle of evidence, that, in a contest between an attaching or execution creditor and a purchaser from the debtor, who has paid value, without notice, actual or constructive, of a fraudulent intent on the part of the seller, the admissions and declarations of the debtor, made anterior to the sale under which title is asserted, are not admissible in evidence against the purchaser to show a fraudulent intent on the part of the debtor in making the sale. *Moses, Blum & Weil v. Dunham, Buckley & Co.*, 173.
20. *Declarations by debtor in contest between attaching and execution creditors; when admissible.*—But in a contest between an attaching creditor and a creditor who has obtained a judgment by confession, over a fund realized from a sale of merchandise, on which the attachment and an execution issued on the confessed judgment had been levied, acts and declarations of the debtor in relation to his property, the debt due the attaching creditor, and his plans and purposes in reference to its payment, done and made before the

EVIDENCE—*Continued.*

- judgment was confessed, are admissible in evidence for the attaching creditor on an issue of fraud *vel non*, made up between the contesting parties, in the absence of all evidence tending to show when the claim of the judgment creditor accrued. *Ib.* 173.
21. *Declarations by grantor in deed, made after its execution; when inadmissible.*—Declarations by a grantor in a deed to land, conveying an absolute title in fee simple, made after the deed was executed, as to what his intentions were in its execution, are inadmissible to establish a trust in favor of third parties, inconsistent with the terms of the deed, or to otherwise vary, affect or impair the rights of the grantee under it. *Eureka Co. v. Edwards*, 248.
 22. *Trespass de bonis asportatis; declarations by principal to agent, verbal acts and competent.*—The declarations of the principal, when first informed of the seizure of the goods by his agent, ordering them to be returned to the plaintiff, and his message to his acting agent, instructing him to have nothing more to do with the goods, are in the nature of verbal acts, tending to show a repudiation of the agent's act, and are competent evidence for the principal in a suit against him and the agent for trespass growing out of such seizure. *Burns v. Campbell*, 271.
 23. *Credits endorsed on note must be proved.*—Where the fact of a partial payment is disputed, an indorsement on a promissory note, purporting to be of a partial payment made at a time when the bar of the statute of limitations was not complete, is not evidence that the payment was made at the time specified. *Curtis v. Daughdrill*, 590.
 24. *Account stated; presumption of correctness.*—If an account is rendered to a debtor, and he admits its correctness, or retaining it, he makes no objection thereto within a reasonable time, he will be bound by it as an account stated, his silence, in the latter event, being an implied admission of its correctness; and if he only objects to one item, this is an admission of the correctness of the other items of the account. *Burns v. Campbell*, 271.
 25. As to the admissibility of confessions, declarations and threats in criminal cases, see CRIMINAL LAW, 2-8, 13-16, 18.

III. BURDEN OF PROOF; WEIGHT AND SUFFICIENCY.

26. *Burden of proof.*—When the burden of proving a particular fact is cast upon a party, if he fails to give evidence of it, or if the evidence in reference thereto is equally balanced, or does not generate a rational belief of the existence of the fact, leaving the mind in a state of doubt and uncertainty, he must fail for want of proof. *McWilliams v. Phillips*, 80.
27. *Payment; burden of proof.*—Where one claims that a debt, the prior existence of which is admitted or proved, has been paid by the substitution of another security, whether it be of higher or of the same dignity as the debt, he assumes the burden of proving that the substituted security was taken and accepted in extinguishment of the debt. *Ib.* 80.
28. *Evidence; provinces of the court and jury.*—While it is the province of the jury to determine the weight and sufficiency of evidence, after it has been introduced, it is always a question for the court to decide, whether there be any evidence on a particular point in a cause; and it is error for the court to submit that question to the jury. *Hames, Adm'r v. Brownlee*, 132.
29. *Deed assailed for fraud; burden of proof on grantee.*—When a conveyance is assailed by creditors of the grantor on the ground of fraud, the burden of proof is on the grantee to establish the existence, the amount, and the validity of the recited consideration. *Gordon, Rankin & Co. v. Tweedy*, 202.

EVIDENCE—*Continued.*

30. As to burden of proof on plea of insanity in criminal cases, see CRIMINAL LAW, 52a.

See COMMON CARRIER, 6, 7.

DEEDS, 1-3, 6.

WAREHOUSEMEN.

IV. OPINIONS AND BELIEF.

31. *What not opinion.*—A statement by a witness on the trial of an action *de bonis asportatis*, that the plaintiff *consented* to the taking of the property by the defendant, is the assertion of a fact, and not of a mere opinion, and is, therefore, admissible evidence. The nature of such consent may be shown on cross-examination. *Street v. Sinclair*, 110.
32. *When witness can not testify to his belief.*—In an action against the Auditor by an attorney, to recover damages alleged to have been suffered by the attorney on account of the Auditor's refusal to allow him to inspect the records in the latter's office, in which were kept the accounts between the State and certain tax collectors represented by the attorney, it is not permissible for either the defendant or his clerk to testify to the *belief* either may have had as to plaintiff's employment, or as to his authority to represent the tax collectors. If such belief were a material fact in the case, it is an inference to be drawn by the jury from the circumstances which may be in evidence. *Brewer v. Watson*, 299.
33. *Motive or belief; how proved.*—It is for the jury to infer motive, belief, or intention, when a material issue, from the facts and circumstances in the case; they can neither be testified to by witnesses, nor made a part of a defendant's statement. *Whizenant v. State*, 383.
34. *Witness' belief or conclusion; when inadmissible.*—On the trial of a defendant indicted for the larceny of two oxen, the evidence connecting the defendant with the larceny tending to show a sale by him of two oxen in witness' presence, and the question being one of identity, it is not permissible for the witness to prove a previous unsworn description which another, when in search of the stolen oxen, had given him, and his belief or conclusion that the description given him corresponded with his recollection of the oxen which the defendant sold in his presence. *Ib.* 383.
35. *Opinion of witness as to combustibility of cotton; when admissible.* A witness, who is conversant with, and has had peculiar opportunities of observing, cotton, its nature and quality, and its liability to catch fire and burn, may express his opinion, in a case in which such opinion is relevant to the issues, that if a blazing missile, or a burning coal is applied to cotton, the cotton would thereby be fired immediately, and would burn with such rapidity that its extinguishment would be improbable, if not impossible. *Seals v. Edmondson*, 509.

V. PAROL AND WRITTEN.

36. *When terms of mortgage can not be varied by parol.*—In a suit in equity for the foreclosure of a mortgage on land, it is not competent for the mortgagor to prove by parol evidence that he intended to convey an interest in the land different from that specified in the mortgage. *Cowley v. Shelby, Trustee*, 122.
37. *Parol evidence of contents of written instrument; when inadmissible.* When a relevant fact consists of the substance of a document or record, the writing must be produced as the best evidence of its own terms; and until its absence is satisfactorily explained, the

EVIDENCE—Continued.

- fact can not be proved by parol. *Hames, Adm'r, v. Brownlee, 132.*
38. *Consideration of deed assailed for fraud; admissibility of parol evidence.*—When a deed to land, reciting a valuable consideration, is assailed for fraud by creditors of the grantor, it may be sustained by parol proof of a valuable consideration different from that expressed or recited, provided it is of the same general character, and not inconsistent with it; as the promissory notes of a third party, instead of money; or stock in a railroad corporation other than that recited in the deed. *Gordon, Rankin & Co. v. Tweedy, 202.*
39. *Same.*—The rule that the consideration clause of a deed can not be varied by parol evidence in a contest between the grantee and the creditors of the grantor, merely prohibits parol proof of a consideration of a different kind from that expressed in the deed—as proof of a valuable consideration when a good consideration is expressed; it does not restrict the grantee to proof of the precise consideration recited in the deed, but he may show any consideration of the same kind. *Pique, Manier & Hall v. Arendale, 91.*
40. *Same.*—Hence, it is competent for a grantee in a deed which recites a moneyed consideration, in a contest between him and a judgment creditor of the grantor, to show, in support of the deed, that the true consideration was partly the payment of a debt or legal liability due from him, or resting upon the grantor, and partly a promise on the part of the grantee to pay the grantor a specific sum of money. *Ib. 91.*
41. As to identification of lands conveyed by general description in deed, see *Bernstein v. Humes, 260; Driggers v. Cassady, 529.*

VI. PRIMARY AND SECONDARY.

42. *Secondary evidence of contents of policy of insurance; recollection can not be refreshed by policy previously issued.*—Plaintiff declared on a verbal agreement to insure merchandise and household goods against loss by fire, and also on policy filled up and signed in pursuance of the verbal agreement, but after the loss and in ignorance of it, which was put by the defendant's agent in his safe, in which he had kept policies issued by defendant to the plaintiff for previous years, covering merchandise in the same storehouse. On the day after the fire plaintiff informed defendant's agent, at his office, that the property insured had been destroyed by fire, when he was shown the policy which had been filled up and signed, and plaintiff then read it and handed it back to the agent, and never afterwards saw it. On the trial, the defendant having failed to produce the policy on notice, the plaintiff was examined in his own behalf as to its contents, and was allowed by the court, against defendant's objection, to look at one of the policies previously issued, and to testify that it corresponded with the one not produced, and in that way to prove the contents thereof. *Held, that the court erred in allowing plaintiff to thus refresh his recollection, and in allowing him thus to prove the contents of the policy. Home Ins. Co. v. Adler, 516.*
43. *When party on whom notice to produce paper writing can not offer parol evidence of its contents contradictory to that offered by opposite party.*—In such case, the defendant having failed to produce on the trial the policy so signed and filled up, and to account for its absence, and the plaintiff having testified to its contents, the defendant can not be allowed to offer parol proof thereof different from that stated by the plaintiff, either for the purpose of showing what the true terms and provisions of the policy were, or for the purpose of contradicting the plaintiff. *Ib. 516.*
44. *Transfer of stock in a private corporation; when can not be proved by*

EVIDENCE—*Continued.*

parol.—When a transfer of stock in a corporation is shown to have been entered on the books of the corporation, it can not be proved by *parol* or secondary evidence, unless a proper predicate is first laid therefor. *Gordon, Rankin Co. v. Tweedy, 202.*

VII. RECORDS.

45. *Justice of the peace; judgment of conviction in criminal case before; how proved; section 3634 of the Code construed.*—A justice's court not being a court of record, a certified transcript of a judgment rendered therein is not legal evidence, unless so made by statute; and the statute (§ 3634 of the Code) making a certified statement of a justice's judgment presumptive evidence of the fact, having no reference to judgments of conviction in criminal cases, but being limited in its operation to judgments in civil suits, a justice's transcript of a judgment of conviction in a criminal case before him is not admissible in evidence. Such judgment can only be proved by the production of the original papers and docket, sustained by competent evidence of identity, or by sworn copies compared by a competent witness. *Burns v. Campbell, 271.*

EXECUTION.

See EJECTMENT, 3.

EXECUTORS AND ADMINISTRATORS.

1. *Estate of decedent; when released from claim.*—Where an attorney, employed by an administrator to represent him on final settlement of his administration, gave to his client a receipt acknowledging payment of his fee for services rendered, although in fact the fee was not paid; and on such receipt as a voucher the administrator was allowed a credit on his settlement for the amount thereof, it must be conclusively presumed that the attorney thereby consented to look to the administrator alone for payment, and to discharge the estate and trust fund from all claim he ever had therefor. *Taylor, Guardian v. McCall, Adm'r, 52.*
2. *Settlement of administrator's accounts; what not a proper credit.* In such case, the attorney can not, by the voluntary, unsolicited act of the administrator *de bonis non*, obtain payment of his claim out of a balance which the estate owes to the administrator in chief, as ascertained by decree on his final settlement; and if the administrator *de bonis non* pay the claim, he can not be allowed credit therefor on the settlement of his administration. *Ib. 52.*
3. *When administrator not entitled to credit for moneys expended.* Where the decedent conveyed lands to his children, subject to a mortgage which he had previously executed thereon, an administrator is not entitled to a credit on settlement of his accounts, after a declaration of insolvency, for moneys paid by him on the mortgage debt. *Dunlap, Adm'r v. Mobley, Adm'r, 102.*
4. *When witness is incompetent.* On the settlement of the accounts of an administrator in chief, after a declaration of insolvency, with the administrator *de bonis non*, a creditor of the estate, being interested in the trust fund represented by the administrator *de bonis non*, though not a party to the record, is not a competent witness for the latter to prove a transaction with the deceased, which would tend to increase the liability of the administrator in chief. *Ib. 102.*
5. *Debt contracted by executor; when imposes only a personal liability.* Under the provisions of a will directing the testator's estate to be kept together and managed by the executor until the youngest child should attain the age of twenty-one years, and authorizing the executor to transact any business pertaining to the interests of the

EXECUTORS AND ADMINISTRATORS—*Continued.*

estate without the orders of any court, the executor has no authority to contract, on the credit of the estate, for the services of a party to take charge of, and superintend the cultivation of lands belonging to the estate; and such a contract, made in 1861, only imposed a personal liability on the executor. *Vann v. Vann, Ex'r*, 154.

6. *When administrator chargeable with damages resulting from unreasonable delay in making settlement.*—When an administrator, without sufficient excuse, delays final settlement and distribution for an unreasonable time, he is chargeable with damages resulting therefrom to legatees or distributees, although he may have safely kept the money of the estate unproductive and unemployed, and although he may make the statutory, exculpatory oath. *Clark, Adm'r v. Hughes*, 163.
7. *Same; measure of damages.*—In such case, the statutory rate of interest is the measure of damages. *Ib.* 163.
8. *Same; from what date interest should be calculated.*—When the statutory oath is taken by an administrator, and it is not successfully controverted, interest should not be computed from the day the assets are reduced to money and thus made ready for distribution, but a reasonable time should be allowed him to make preparation for, and consummate a settlement of his administration, including time for an arrangement of materials, and for conference with counsel, preliminary to filing his account, or bill in chancery, as the questions to be decided may require, and also for conducting the proceedings to final decree. *Ib.* 163.
9. *Same; what constitutes reasonable time.*—What should be considered a reasonable time in such case, would be the time consumed by an ordinarily prudent man in commencing and carrying through a litigation of similar character, which he had previously determined to institute, and must depend, in a large measure on the facts of each particular case, varying with the complication of facts or legal principles involved, and the tribunal in which the settlement is made. *Ib.* 163.
10. *Same; sale of lands for division; when not prejudicial to administrator on question of interest.*—The statute expressly authorizing a sale of lands for division, when they "can not be equitably divided amongst the heirs or devisees," and requiring that the application therefor must be made by the administrator or executor, the fact that an administrator sold lands for division, thereby causing delay in the settlement of the estate, can not exert a prejudicial influence against him in the matter of charging him with interest as damages, in the absence of proof that the sale was not necessary to effect an equitable division, or that he acted in bad faith. *Ib.* 163.
11. *Interest against administrator as damages for delay in making final settlement; from what date to be computed.*—On the settlement of the accounts of an administrator of the estates of two decedents, one of whom was an heir of the other, in a court of equity, on a bill filed by the distributees of the deceased heir against the administrator, and against the distributees of the ancestor, who were non-residents of the State,—*held*, that eighteen months after the estates became ready for final settlement and distribution was a reasonable time for instituting a suit for that purpose, and for carrying such suit to a final determination; and that after the expiration of the eighteen months, the administrator was chargeable with interest as damages resulting from the delay, although he had made the statutory affidavit, and it was not controverted. *Ib.* 163.
12. *When administrator chargeable with interest.*—The payment by an

EXECUTORS AND ADMINISTRATORS—*Continued.*

- administrator, with the will annexed, of a legacy which was barred by the lapse of time, is a misappropriation by him of the funds belonging to the estate; and he is chargeable with interest thereon from the date of the misappropriation. *Moody, Adm'r v. Hemphill, 169.*
13. *When administrator not entitled to credit for taxes.*—The administrator, in such case, is not entitled to a credit for State and county taxes assessed against the funds thus misappropriated, and paid by him. *Ib. 169.*
 14. *When administrator entitled to a credit for costs of appeal in this court.*—Where an administrator, with the will annexed, on final settlement in the probate court, was allowed credit for a legacy which he paid, but on appeal this court held that the legacy was barred by the lapse of time, and that, therefore, the credit was improperly allowed, he is entitled to credit for the costs of the appeal paid by him, on settlement had after the cause had been remanded, he having acted in good faith in making the payment, and in the consequent litigation, and there being reasonable ground for controversy. *Ib. 169.*
 15. *When administrator not entitled to costs of suit instituted by him.* But where the administrator, after the decision of this court, on the appeal, filed a bill in the chancery court, to enjoin the distributees from contesting further his claim to a credit for the amount paid by him on such legacy, and, on appeal to this court in that case, his bill was dismissed, he is not entitled, on final settlement, to a credit for the costs in the chancery court, or the costs of the appeal. *Ib. 169.*
 16. *Administrator entitled to credit for attorney's fee on final settlement.* An administrator is entitled to a credit for a reasonable fee paid his counsel for services rendered him on final settlement. *Ib. 169.*
 17. *When administrator not entitled to credit for taxes paid on land.*—An administrator is not entitled to a credit, on final settlement, for taxes paid by him on lands belonging to the estate, in the absence of evidence showing that the personal assets should be charged with the payment of such taxes, or that it was the duty of the administrator, in his representative capacity, to pay them. *Ib. 169.*
 18. *Jurisdiction of probate court to order sale of decedent's lands; character of; when decree can not be collaterally assailed.*—The jurisdiction of the court of probate to order a sale of a decedent's lands, for the payment of debts, or for distribution, being statutory, before it can be affirmed to exist, the record of the proceedings must affirmatively show that an application has been preferred by the personal representative, disclosing a statutory ground for the sale; but when the record shows that the court had acquired jurisdiction, irregularities or actual errors can not affect the validity of the proceedings, when collaterally assailed. *Landford v. Dunklin et al., Adm'rs, 594.*
 19. *Order of sale of decedent's land by probate court; conclusive of what facts.*—In granting such order the court is presumed to have adjudged every fact and question essential to the validity of the order, including the fact that the petitioner is the personal representative of the estate of the decedent whose land is ordered to be sold; and hence, the sale can not be impeached in a collateral proceeding on the ground that he had ceased to be administrator before the proceedings were begun, or that the grant of letters to him was invalid. *Ib. 594.*
 20. *Grant of administration to sheriff; when not void.*—While it is irregular to grant letters of administration upon a decedent's estate to the sheriff or coroner, when there is a general administrator capable of acting, unless, in the particular case, there are facts

EXECUTORS AND ADMINISTRATORS—*Continued.*

and circumstances which render it improper to commit the administration to him, such irregularity does not render the grant void, or subject it to attack in a collateral proceeding. *Ib.* 594.

21. *Jurisdiction of probate court to grant administrations, general, not limited.*—The jurisdiction of the probate court to grant administrations is derived from the constitution, and is general and unlimited; and when its grants of administration are drawn in question collaterally, they are protected by the presumption extended to the judgments and decrees of all courts of general jurisdiction. *Ib.* 594.
22. *Right of personal representative to bring ejectment.*—The effect of our system, subjecting lands descended or devised to administration, rendering them liable to the payment of the decedent's debts, and conferring upon the personal representative power to rent them, and to intercept the descent, or defeat the devise, by sale under the order of the probate court, is, that the personal representative is entitled to maintain any action at law for their recovery that the heir or devisee can maintain; the right of the heir or devisee yielding to the right of the personal representative when he elects to assert it. *Ib.* 594.
23. *Sale of lands by personal representative; when title of the heirs or devisees not divested.*—Under a sale of lands by a personal representative, made in pursuance of a decree of the probate court, the title of the heirs or devisees is not divested, until a conveyance is executed by the order of the court; and hence, a conveyance of the lands, executed by the personal representative without such order, is wholly inoperative in a court of law. *Ib.* 594.
24. *Same; when administrator de bonis non may maintain ejectment.* Where lands were sold by an administrator in chief under a valid order of the probate court, and the purchase-money was afterwards paid, but no report of its payment was made, and no order was entered directing a conveyance to the purchaser, the administrator executing a deed without such order, the legal title to the lands did not thereby pass to the purchaser, and an administrator *de bonis non* can maintain ejectment against the purchaser for the recovery thereof. *Ib.* 594.
25. *Grant of letters of administration to sheriff expires with the term of office.*—The grant of letters of administration to a sheriff *virtute officii*, by the express language of the statute, attaches to the office; and the grant expires with the expiration of his term of office as sheriff. *Ib.* 594.
26. *Grant of administration to sheriff; when no order of revocation required to create vacancy.*—A grant of letters of administration to a sheriff *virtute officii* expiring with the termination of his official term, no subsequent order of revocation is required to create a vacancy; and hence, a grant of administration *de bonis non*, made after his office had expired, without any formal order revoking his letters, is valid. *Ib.* 594.

See CHANCERY, 6, 7, 9-11, 17.

EXEMPTIONS.

1. *Right of, dependent on residence in the State.*—The constitution and statutes of this State render residence within the State an essential element of the right to an exemption of a homestead, or of personal property from liability for the payment of debts; and the right, springing from, and being dependent upon the *status* of residence within this State, it may be admitted, terminates whenever the *status* is changed by the acquisition of a residence in another State. *McCrary v. Chase & Co.*, 540.

EXEMPTIONS—*Continued.*

2. *Right of, must be determined at the time lien of process attaches.* But the right to such exemption must be determined according to the state of facts existing when the lien of an execution or other process attaches. *Ib.* 540.
3. *Contestation of exemption, a suit; by what facts supported.*—The contestation of a claim of exemptions is essentially a suit, in which the plaintiff causing the levy is the actor, and the levy is the institution of the suit. The causes of contest assigned must be supported by facts existing at the time the contest is instituted; and the subsequent occurrence of facts essential to the plaintiff's right of recovery, operating to defeat or divest the right of exemption, will not support the contest. *Ib.* 540.
4. *Same.*—Hence, where personal property levied on under an execution was claimed as exempt by the defendant in execution, and the claim was contested, and at the time of the levy and of making the claim the defendant was a resident of this State, his subsequent removal from the State, and residence in another State at the time of the trial of the contest can not deprive him of his right to an exemption of the property levied on from the payment of the execution. *Ib.* 540.
5. *Surplus on foreclosure of mortgage on real estate; when widow not entitled to as exempt.*—Where a mortgage on real estate is foreclosed by sale after the death of the mortgagor, and a surplus, left after paying the mortgage debt, is paid to the administrator, the widow can not claim such surplus as personal property exempt to her under the statute. *Beard, Adm'r v. Smith*, 568.

See CHANCERY.

BANKRUPTCY.

FINE AND FORFEITURE FUND.

1. *Sheriff's fees for summoning witnesses for defendants in State cases; not a claim against the county.*—A sheriff's fees for summoning witnesses for insolvent defendants in criminal cases, being for services rendered for the defendants, are not a charge against the fine and forfeiture fund of the county. *Cohen v. Coleman*, 496.

FRAUD.

1. *Declarations of debtor in contest between creditor and purchaser; when inadmissible.*—It is a well settled principle of evidence, that, in a contest between an attaching or execution creditor and a purchaser from the debtor, who has paid value, without notice, actual or constructive, of a fraudulent intent on the part of the seller, the admissions and declarations of the debtor, made anterior to the sale under which title is asserted, are not admissible in evidence against the purchaser to show a fraudulent intent on the part of the debtor in making the sale. *Moses, Blum & Weil v. Dunham, Buckley & Co.*, 173.
2. *Declarations by debtor in contest between attaching and execution creditors; when admissible.*—But in a contest between an attaching creditor and a creditor who has obtained a judgment by confession, over a fund realized from a sale of merchandise, on which the attachment and an execution issued on the confessed judgment had been levied, acts and declarations of the debtor in relation to his property, the debt due the attaching creditor, and his plans and purposes in reference to its payment, done and made before the judgment was confessed, are admissible in evidence for the attaching creditor on an issue of fraud *vel non*, made up between the

FRAUD—*Continued.*

contesting parties, in the absence of all evidence tending to show when the claim of the judgment creditor accrued. *Ib.* 173.

See COMMON CARRIER, 11-14.

FRAUDULENT CONVEYANCES.

FRAUDS, STATUTE OF.

1. *When trust must be evidenced in writing; statute of frauds.*—When a resulting trust in lands does not arise from facts attending the creation of the legal estate, but is dependent on the agreement or declaration of the parties, it can not rest in parol, but must, under the statute of frauds, be created by writing, signed by the party declaring or creating the same, or his agent or attorney lawfully authorized thereto in writing. *Rose v. Gibson*, 35; *Whaley v. Whaley*, 159.
2. *Same.*—Where a trust in land, attempted to be established, imposes, by agreement of the parties, active duties on the trustee, it is not such a trust as results by implication of law, and is not valid, unless it was created by instrument in writing signed by the party creating or declaring the trust, or his agent or attorney lawfully authorized thereto in writing. *Rose v. Gibson*, 35.
3. *Parol contract for sale of lands; rule as to proof of part performance to take it out of the statute of frauds.*—To take a parol contract for the sale of lands out of the statute of frauds by part performance, and to obtain a specific performance thereof, the contract must be clearly proved, and the acts relied on as a part performance "should be so clear, certain and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part execution." *Pike v. Pettus*, 98.
4. *Same; when specific performance will not be decreed.*—When the testimony in reference to the contract is so conflicting that it can not be said to be "clearly proved;" or when the acts relied on as a part performance are of an equivocal nature, being such as might have been done with other views than in part execution of the agreement, a court of equity will not enforce a specific performance of the contract, or grant relief depending on the existence of the contract and its validity. *Ib.* 98.
5. *Parol agreement to convey lands; when statute of frauds not applicable to.*—A parol agreement between husband and wife, by which he agreed to convey to her lands or other property, in consideration of a relinquishment of her inchoate right of dower in other lands which he desired to sell and convey, may be proved by her in support of a conveyance executed to her by the husband, reciting a valuable consideration, not inconsistent with that sought to be proved, as against creditors of the husband, attacking the conveyance on the ground of fraud. Such an agreement is only voidable under the statute of frauds, and the protection of the statute can not be invoked by the creditors, if the benefit thereof is repudiated by the husband. *Gordon, Rankin & Co. v. Tweedy*, 202.
6. *Executed contracts; statute of frauds not applicable to.*—Such agreement having been executed, the statute of frauds has no application. *Ib.* 202.
7. *Promissory note; when not within statute.*—Where a party, after having taken steps to secure public lands as a homestead under the acts of Congress commencing with section 2289 of the Revised Statutes, and after having made improvements thereon by erecting houses, etc., at the end of two years, abandons all intention of securing the lands as a homestead, and executes, on the back of his preliminary certificate, a relinquishment of his claim to the Govern-

FRAUDS, STATUTE OF—*Continued.*

ment, and sells the improvements he had erected thereon to another, delivering to him his certificate with the relinquishment endorsed thereon, and possession of the lands, such a transaction is not a sale of an imperfect pre-emption or homestead right, and a note made by the purchaser for the purchase-money is not tainted with illegality; nor does it, in any way, offend the statute of frauds. *Tarrance v. Hatfield*, 234.

8. *Parol sale of land under power contained in mortgage; mortgagor can not complain of.*—A mortgagor can not complain that a parol sale of lands by the mortgagee under a power contained in the mortgage is void, because it was not evidenced by writing as required by the statute of frauds. The benefit of this statute is not available without being specially pleaded, and if waived, and the contract is admitted or satisfactorily proved, it will be enforced. *Cooper v. Hornsby*, 62.
9. *Statute of frauds; when contract within.*—A contract for labor or personal services for one year, to begin *in futuro*, is void under the statute of frauds, unless it, "or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some person by him thereunto authorized in writing." *Horton v. Wollner, Hirshberg & Co.*, 452.
10. *Statute of frauds; contract not to be performed within one year.*—In order to take a contract for personal services for one year, to begin *in futuro*, without the statute of frauds, all its essential terms, including the amount of salary or compensation to be paid for such services, must be stated in the writing, with such degree of certainty as to render a resort to oral evidence unnecessary to an ascertainment of the intention of the parties. *Ib.* 452.
11. *Same.*—It is not sufficient that such contract should state that the salary is to remain the same as that received for the previous year; as this renders a resort to verbal or extrinsic evidence necessary to ascertain the amount of the salary, thereby supplementing the contract in a way forbidden by the letter and spirit of the statute. *Ib.* 452.
12. *Same; when void contract rebuts presumption of continuance of former contract.*—Where one having been in the employment of another under a contract for one year, before the expiration of the term, makes a new contract for another year, which is void for want of conformity to the provisions of the statute of frauds, and in which the character of the services to be performed are changed, he can not recover upon an implied agreement that his employers would pay him the same salary which they had paid him for the previous year. In such case, the new contract, although void under the statute of frauds, destroys the implication of an intention to continue in force the old one. *Ib.* 452.
13. *Statute of frauds; when parol agreement not within.*—W. & B. made a written contract for the cultivation of a piece of land, by which W. was to furnish the land and team, and B. the labor, the crop to be divided between them. Afterwards B. became indebted to T. for advances, for which he executed his note in the form prescribed by the statute (Code, 1876, § 3286). Before the crop was gathered, it was abandoned by B., and gathered by T. and stored in a house on W.'s premises, from which it was afterwards removed and used by T. *Held*, in trover by W, against T. for a conversion of the crops,
 - (a) That a parol agreement made between W. and T. after B. had abandoned the crop, that T. should have the crop gathered, and, after paying his own claim, should pay over the balance of the proceeds of the crop to W. was not void under the statute of frauds as a promise by W. to answer for the debt of B.

FRAUDS, STATUTE OF—*Continued.*

(b) That even if the agreement could be construed to be such a promise, there was a new and valuable consideration therefor, which withdrew it from the statute of frauds. *Thornton v. Williams*, 555.

FRAUDULENT CONVEYANCES.

1. *Deed assailed for fraud; burden of proof on grantee.*—When a conveyance is assailed by creditors of the grantor on the ground of fraud, the burden of proof is on the grantee to establish the existence, the amount, and validity of the recited consideration. *Gordon, Rankin & Co. v. Tweedy*, 202.
2. *Consideration of deed to land assailed for fraud; admissibility of parol evidence as to.*—When a deed to land, reciting a valuable consideration, is assailed for fraud by creditors of the grantor, it may be sustained by parol proof of a valuable consideration different from that expressed or recited, provided it is of the same general character, and not inconsistent with it; as the promissory notes of a third party, instead of money; or stock in a railroad corporation other than that recited in the deed. *Ib.* 202.
3. *Release of dower by the wife, as consideration of conveyance to her by the husband.*—The release by a married woman of her inchoate right of dower in her husband's lands, may be a valuable consideration for a conveyance of other lands to her husband, whether the release is executed contemporaneously with the execution of the deed, or in pursuance of a previous agreement; but such contracts between husband and wife must be reasonable and free from fraud, in order to be sustained in a court of equity, when the husband's deed to her is attacked by creditors, and should be especially scrutinized when the husband is at the time insolvent, or in failing circumstances. *Ib.* 202.
4. *Value of inchoate right of dower, when consideration for a deed; how estimated.*—In a suit in equity by creditors of the husband to have a deed to land, executed by him to his wife, set aside as fraudulent and void, standard annuity tables, founded in human experience and observation, furnish the proper rule by which the court should ordinarily be governed in computing the probable value of the wife's inchoate right of dower in lands, conveyed by the husband to a third party, the release of which forms a part of the consideration of the deed to her, which is assailed by the husband's creditors; but in no event should the value of the dower interest exceed one-sixth of the value of the lands. *Ib.* 202.
5. *Husband's liability to the wife for interest on her statutory separate estate.*—Under the statutes regulating the estates of married women, the husband is not liable for interest on moneys belonging to the statutory separate estate of his wife which were used, or converted by him; and hence, interest thereon is not such a consideration as will support a conveyance by him to her, when assailed by his creditors on the ground of fraud. *Ib.* 202.
6. *Husband's liability for interest on wife's equitable estate.*—Nor is the husband liable for interest on moneys belonging to his wife's equitable estate, which he has used or converted, in the absence of an agreement on his part to pay interest, or an express dissent on her part to the use thereof by him; and, hence, interest thereon will not support a conveyance by him to her, when assailed by creditors, in the absence of such agreement on his part, and of such dissent on her part. *Ib.* 202.
7. *Inadequacy of price, a badge of fraud; when fraud will be inferred from it alone.*—Inadequacy of price is a badge of fraud; and when the inadequacy is so great as to shock the conscience—when the

FRAUDULENT CONVEYANCES—*Continued.*

price is so far below the market value of the property, as to strike the understanding of an honest and intelligent man with the conviction that the sale never could have been made in good faith—fraud may be inferred from it alone; and the case is strengthened when other badges of fraud, such as the embarrassed pecuniary condition of the debtor, the pendency of suits against him, etc., are also shown. *Ib.* 202.

8. *When conveyance of land fraudulent for inadequacy of consideration.* The deed attacked by creditors of the grantor in this case, tested by the principles above stated, is held constructively fraudulent, conveying, as it does, to the wife of the grantor a tract of land worth between \$4,000 and \$5,000, the consideration therefor being a relinquishment of her inchoate right of dower in another tract, which the husband had sold and conveyed, the value of which is not satisfactorily shown, an indebtedness for railroad stock worth \$485, the alleged property of the wife, which the husband had sold, and converted, the transfer of which to the wife is not proved by legal evidence, and a further indebtedness to the wife for moneys belonging to her, which he had used, and interest thereon, amounting to to \$646; it also being shown that at the time of the execution of the conveyance, the husband was financially embarrassed. *Ib.* 202.
9. *Deed constructively fraudulent; when a security for real consideration shown.*—When a deed is fraudulent in fact, and, for that reason, void as against existing creditors of the grantor, it will not be permitted, on attack by the creditors, to stand for the purpose of reimbursement or indemnity to the grantee; but when, as in this case, it is only constructively fraudulent by reason of inadequacy of consideration, and financial embarrassment of the grantor at the time of its execution, it may stand as a valid security for the consideration actually paid. *Ib.* 202.
10. *When transfer of choses in action held free from fraud.*—It was further held in this case, that a transfer of choses in action, made by a husband, who was in failing circumstances, to his wife, was free from fraud, actual or constructive; it being shown that the transfer was based on an adequate consideration, and it not sufficiently appearing that, if there was a fraudulent intent on the part of the grantor, the grantee participated therein. *Ib.* 202.
11. *Conveyance of lands void for actual fraud; grantee chargeable with rents.*—In cases of actual fraud a fraudulent grantee must be considered as a trustee of the rents and profits, as well as of the corpus, of the property conveyed, and as holding them in the right, and for the benefit of attacking creditors; and hence, where a conveyance of land has been declared void for actual fraud, on bill filed by creditors of the grantor, the grantee is chargeable with rents. (*Marshall v. Croom*, 60 Ala. 121, overruled on this point.) *Kitchell, Adm'r v. Jackson*, 556.
12. *Same; from what time rents to be estimated.*—But the rents or profits in such case should only be allowed from the service of the summons on the grantee, as that, strictly speaking, is the true time of the demand on him therefor. *Ib.* 556.
13. *When fraudulent deed of trust can not be declared a general assignment.*—A deed of trust, made with the intent to hinder, delay or defraud the grantor's creditors, can not be upheld and declared a general assignment, at the suit of creditors not secured thereby against other unsecured creditors who have caused attachments to be levied on the property conveyed by the deed, or who have attacked the deed for fraud. *Com'l Bank of Selma v. Brewer*, 574.
14. *When deed of trust executed by insolvent debtor fraudulent and void as to creditors.*—A deed of trust executed by an insolvent debtor

FRAUDULENT CONVEYANCES—*Continued.*

on 1st April, conveying to a trustee, as security for debts owing to some of his creditors therein named, then past due, his entire stock of goods and merchandise then on hand, and in a certain storehouse, embracing all his unincumbered property, and also all the goods and merchandise he might thereafter bring into said storehouse for the purpose of increasing, replenishing, or keeping up his stock, and expressly providing that the grantor was to "have and retain possession of said property" until the 1st November following, and that if the secured debts were not paid by that time, the deed was to be null and void, with a power of sale on default in payment, but not providing for an extension of the debts,—is fraudulent and void as against the unsecured creditors of the grantor, although neither the trustees nor the beneficiaries had any notice of the grantor's insolvency at the time the deed was executed. *Ib.* 574.

See LIMITATIONS, STATUTE OF, 1, 2.

FRAUDS, STATUTE OF, 5.

GARNISHMENT.

1. *A legal proceeding.*—A garnishment is not an equitable, but essentially a legal proceeding; and only such demands as the debtor, by an action at law in his own name, can enforce, the creditor may thereby reach and condemn. *Harris v. Miller*, 26.
2. *When legal demand can not be subjected to.*—If, however, a legal demand is complicated and involved with matters strictly and purely of equitable cognizance, which must be adjusted before full and complete justice can be done, it can not be reached by garnishment, and the parties will be remitted to a court of equity. *Ib.* 26.
3. *Judgment against garnishee; what errors thereby cured.*—The appearance and answer of a garnishee, without objection, cure whatever of defect or irregularity there may have been in the writ or summons, and the judgment thereafter rendered is conclusive upon him. *Betancourt v. Eberlin, Adm'r*, 461.
4. *Levy of attachment by service of garnishment; effect of; irregularities in garnishment can not affect validity of judgment.*—In attachment jurisdiction may be acquired by service of garnishment on defendant's debtor, which will be as full and complete as could have been acquired by a levy of the attachment on real estate, or on visible, tangible chattels, capable of manual seizure; and the garnishment being merely incidental and auxiliary to the attachment, errors intervening therein can not affect the validity of the judgment rendered against the defendant. *Ib.* 461.
5. *Payment by garnishee before judgment condemning debt; effect of.* Until there is a judgment rendered, condemning indebtedness of the garnishee to the payment of the demand for which it was attached, the garnishee is not authorized to pay, nor is any person, official or otherwise, authorized to demand payment by virtue of the garnishment; and a payment so made will not discharge the indebtedness of the garnishee to his creditor. *Mason v. Crabtree*, 479.

GUARDIAN AND WARD.

1. *Devastavit by guardian; trustee in invitum.*—Where a guardian, having purchased a lot of land, partly for cash, and partly on credit, used his ward's money in making the cash payment, taking the title in his own name, and securing the unpaid purchase-money by mortgage on the lot,—*held*, that in thus using the ward's money, he committed a *devastavit*; and that his vendor, having received

GUARDIAN AND WARD—*Continued.*

- the money with a knowledge of its trust character, thereby became a trustee *in invitum*. *Robinson v. Peabworth*, 240.
2. *When ward not estopped from pursuing funds invested by the guardian, by proceedings on final settlement of the guardianship.*—Where a guardian, having purchased a lot of land, partly for cash, and partly on a credit, used his ward's funds in making the cash payment, taking the title in his own name, and securing the unpaid purchase-money by mortgage on the lot, which was afterwards foreclosed under a power of sale contained therein, and purchased by one charged with notice of the trust character of the funds used in making the cash payment, the fact that the guardian on final settlement of his guardianship did not receive a credit for the funds so used, but a decree was rendered therefor against him and his sureties, which had not been satisfied, does not estop the ward from pursuing the funds into the lot in which they were invested, and from subjecting the lot to sale for the payment thereof. *Ib.* 240.

See HUSBAND AND WIFE.

HABEAS CORPUS.

1. *When not appropriate remedy.*—*Habeas corpus* is an appropriate and legal remedy for the release of a prisoner who is restrained of his liberty by virtue of process issued under the order or judgment of a court, only in cases where there is a want, or excess of jurisdiction in the court, under the order or judgment of which the process issued; and hence, where the court had jurisdiction both of the subject-matter, and of the prisoner's person, he can not be discharged on *habeas corpus*. *Ex parte The State, in re Merlet*, 371.

HOMESTEAD.

1. *Homestead exemption in favor of tenants in common.*—Under the constitution of 1868, the right of homestead exemption attaches to lands owned and occupied by tenants in common; but the area of the homestead is not enlarged on account of their fractional interests in the land, so as to make up in quantity what is wanting in extent of ownership. *Snedecor v. Freeman*, 140.
2. *Same; extent of.*—Where two tenants in common, entitled to homestead exemptions under the constitution of 1868, owned an undivided one-eighth interest each in a tract of land containing four hundred acres, and resided on the land, each on a separate eighty acre sub-division, their homesteads can not exceed an undivided one-eighth interest in eighty acres of the land each, to be so selected as to include their actual places of residence; and hence, neither of them can claim an exemption of his entire interest in the whole tract, although it amounted to less than eighty acres. *Ib.* 140.
3. *Same; validity of mortgage executed without signature and assent of wife.*—As the homestead of the two tenants could not collectively embrace more than their interests in one hundred and sixty acres of the land, a mortgage jointly executed by them, purporting to convey the entire tract, is not void as to their interests in the balance of the tract, because it did not receive the voluntary signatures and assents of their wives. *Ib.* 140.
4. *Same; when can not be recovered in ejectment against party in possession claiming under mortgage.*—Such tenants, having removed from the land after the execution of the mortgage, and the land having been sold under a power contained in the mortgage after their removal, can not recover in an action of ejectment brought by them against a party in possession claiming under the purchase

HOMESTEAD—*Continued.*

- at the mortgage sale, on the ground that the mortgage conveyed their homesteads, and, not having been executed by their wives, was void, in the absence of all evidence tending to show that they had ever selected or set apart their homesteads. *Ib.* 140.
5. *Homestead exemption in favor of widow and minor children under § 2840 of the Code of 1876.*—The widow and minor children of a decedent who, a resident of this State, died intestate in 1878, owning no homestead, but occupying at the time of his death a rented dwelling, are entitled, under the provisions of section 2840 of the Code of 1876, to a homestead exemption in a lot and storehouse in a town, the only real estate of which the decedent died seized and possessed, and which was worth less than one thousand dollars, although the storehouse had never been occupied as a dwelling. *Hartsfield v. Harvoley, Adm'r*, 231.
 6. *Same; when estate insolvent, vests absolutely.*—In such case, the estate of the decedent being insolvent, the exemption vests absolutely in the widow and minor children under the provisions of section 2827 of the Code. *Ib.* 231.
 7. *When proceedings to set apart homestead to widow under § 1738 of the Code of 1852, void.*—Proceedings instituted by the widow of a decedent in the probate court to have set apart to her a homestead exemption under section 1738 of the Code of 1852, no part of which contains any description whatever of the lands sought to be set apart as exempt, but in which blanks are left for such description, are absolutely void. *Tanner v. Thomas*, 233.
 8. *Homestead exemption; may be claimed by surety in confessed judgment for fine and costs on conviction for a misdemeanor.*—A surety in a judgment confessed under the statute for the fine and costs in a prosecution for a misdemeanor, is entitled to a homestead exemption as against an execution issued on such judgment. *The State for use, etc. v. Allen*, 543.
 9. *What not a sale of homestead right under act of Congress.*—Where a party, after having taken steps to secure public lands as a homestead under the acts of Congress commencing with section 2289 of the Revised Statutes, and after having made improvements thereon by erecting houses, etc., at the end of two years, abandons all intention of securing the lands as a homestead, and executes, on the back of his preliminary certificate, a relinquishment of his claim to the Government, and sells the improvements he had erected thereon to another, delivering to him his certificate with the relinquishment endorsed thereon, and possession of the lands, such a transaction is not a sale of an imperfect pre-emption or homestead right, and a note made by the purchaser for the purchase-money is not tainted with illegality. *Tarrance v. Hatfield*, 234.

HOMICIDE.

See CRIMINAL LAW.

HUSBAND AND WIFE.

1. *Choses in action belonging to wife's statutory separate estate; power of husband to collect.*—The husband has the power to reduce to possession choses in action belonging to the wife as her statutory separate estate. *Smith v. Whitfield*. 106.
2. *Same; power of husband to reinvest.*—When such choses in action have been reduced to possession by the husband, he, as trustee of the wife, has the power, and it is his duty to invest the proceeds in other property; and when invested in other property, such property becomes the statutory separate estate of the wife. *Ib.* 106.

HUSBAND AND WIFE.—*Continued.*

3. *Wife's statutory separate estate; what a part of.*—Where the wife, as legatee, was entitled to a distributive share in certain assets in the hands of the personal representative of her testator, consisting in part of a note made by a debtor to the estate, such distributive share being her statutory separate estate, and the husband purchased for her from such debtor a horse and paid for it by getting the personal representative to credit the amount of the price of the horse on the note, and charge it to the wife on account of her distributive share in said estate,—*held*, that this was not an assignment or transfer by the husband of a part of the distributive share of the wife in payment for the horse, but was a payment of the price of the horse by a payment *pro tanto* of the wife's distributive share; and that, by operation of law, the legal title to the horse vested in the wife, as her statutory separate estate. *Ib.* 106.
4. *Competency as witnesses for each other.*—In civil cases, husband and wife are competent witnesses for each other, to prove any fact that did not come to their knowledge through the channel of the conjugal relation or which is manifestly not confidential. This embraces all matters which must have been intended by them to be made public, and the disclosure of which would not be a violation of marital confidence, or tend to engender matrimonial discord. *Gordon, Rankin & Co. v. Tweedy*, 202.
5. *Husband and wife; competency as witnesses for or against each other.* It must be regarded as settled, that when, in any case, husband and wife are competent witnesses against each other, they are also competent witnesses for each other. *Tucker v. State*, 342.
6. *Same; when wife competent witness for husband in criminal case.* On the trial of the husband for an assault and battery on his wife, she is a competent witness for him. *Ib.* 342.
7. *Release of dower by the wife, as consideration of conveyance to her by the husband.*—The release by a married woman of her inchoate right of dower in her husband's lands, may be a valuable consideration for a conveyance of other lands to her by the husband, whether the release is executed contemporaneously with the execution of the deed, or in pursuance of a previous agreement; but such contracts between husband and wife must be reasonable and free from fraud, in order to be sustained in a court of equity, when the husband's deed to her is attacked by creditors, and should be especially scrutinized when the husband is at the time insolvent, or in failing circumstances. *Gordon, Rankin & Co. v. Tweedy*, 202.
8. *Value of inchoate right of dower, when consideration for a deed; how estimated.*—In a suit in equity by creditors of the husband to have a deed to land, executed by him to his wife, set aside as fraudulent and void, standard annuity tables, founded in human experience and observation, furnish the proper rule by which the court should ordinarily be governed in computing the probable value of the wife's inchoate right of dower in lands, conveyed by the husband to a third party, the release of which forms a part of the consideration of the deed to her, which is assailed by the husband's creditors; but in no event should the value of the dower interest exceed one-sixth of the value of the lands. *Ib.* 202.
9. *Husband's liability to the wife for interest on her statutory separate estate.*—Under the statutes regulating the estates of married women, the husband is not liable for interest on moneys belonging to the statutory separate estate of his wife which were used, or converted by him; and hence, interest thereon is not such a consideration as will support a conveyance by him to her, when assailed by his creditors on the ground of fraud. *Ib.* 202.
10. *Husband's liability for interest on wife's equitable estate.*—Nor is the husband liable for interest on moneys belonging to his wife's equit-

HUSBAND AND WIFE—*Continued.*

- able estate, which he has used or converted, in the absence of an agreement on his part to pay interest, or an express dissent on her part to the use thereof by him; and hence, interest thereon will not support a conveyance by him to her, when assailed by creditors, in the absence of such agreement on his part, and of such dissent on her part. *Ib.* 202.
11. *Earnings of the wife the property of the husband.*—At common law, the earnings of the wife during coverture belonged to the husband; and this principle is not abrogated by our statutory system. *Ib.* 202.
 12. *When husband acts as agent for his wife.*—Where a guardian, having purchased a lot of land, partly for cash, and partly on credit, used his ward's money in making the cash payment, taking a deed in his own name, executed by husband and wife, in usual form, and securing the unpaid purchase-money by executing to the husband a mortgage on the lot, in which the debt was recited as due to the husband, while the lot belonged to the wife, but the fact of her ownership did not appear on the face of the papers, nor was otherwise made known,—*held*, that the husband, in making the sale, acted as agent of the wife, and that she ratified the agency by joining in the execution of the deed. *Robinson v. Peabworth*, 240.
 13. *When notice to the husband is notice to the wife.*—In such case, after a sale of the lot under a power contained in the mortgage, at which it was bid off by, and conveyed to a third party, who acted merely for the wife, and who subsequently executed a conveyance to her, and after a recovery of the lot by the wife in an action of ejectment, on bill filed by the ward, seeking to subject the lot to sale for the payment of the money which was paid to the husband by the guardian, it was further held that notice to the husband was notice to the wife, and that she could claim no higher rights, or greater exemptions, than her husband could have claimed, if the lot had been his property. *Ib.* 240.
 14. *When party not a bona fide purchaser.*—The lot having been the property of the wife, and the debt for the unpaid purchase-money, though payable on its face to the husband, having been in fact due to her, when she, through another, made the purchase, she simply bought mortgaged property in payment of her debt; and hence, being charged with notice of the ward's prior equity, she did not thereby become a *bona fide* purchaser. *Ib.* 240.
 15. *Same.*—But if the lot had been the property of the husband, and the purchase-money secured by the mortgage had been due to him, the testimony in reference to the consideration of the wife's purchase, merely showing that it was a "large amount" which the husband owed her, is wholly insufficient to establish a valuable consideration parted with by her, or even to establish a *bona fide* indebtedness from the husband to her, so as to affect the rights of creditors, or third parties. *Ib.* 240.
 16. *Trespass de bonis asportatis by the husband; damages to goods of the wife can not be recovered in.*—In trespass by the husband against his mortgagee for an alleged illegal seizure of goods under the mortgage, the plaintiff can not recover damages for a seizure of goods belonging to the *corpus* of the wife's statutory separate estate; but for such damages the wife must sue alone. *Burns v. Campbell*, 271.
 17. *Bankruptcy; effect of on husband's right to sue for rents of lands belonging to the wife's statutory separate estate.*—While rents of lands belonging to the wife, as her statutory separate estate, and received by the husband during coverture, are held by him in trust, and are not affected by his bankruptcy; yet, the death of the wife, intestate, terminating the trust, and creating, under the statute, a new right in the husband, rents of such lands, accruing thereafter,

HUSBAND AND WIFE—*Continued.*

- become the absolute property of the husband, and the right to collect them passes to his assignee in bankruptcy. *Gayle v. Randall*, 469.
18. *Widow's distributive share in husband's estate; statutory separate estate.*—The statute requiring that, in the computation of the widow's dower and distributive share in the deceased husband's estate, the value of her separate estate shall be deducted (Code, 1876, § 2715-16), refers to an estate created by the constitution and statutes, and not to an equitable estate, an estate which is made separate by the terms of its creation. *Harris v. Harris*, 536.
 19. *Husband and wife; right of husband to renounce his marital rights in wife's statutory separate estate.*—The husband may renounce the trusteeship of the legal estate of the wife and all the privileges incident thereto, as he could have renounced all his marital rights at common law; and the effect of such renunciation is, that the property remains the property of the wife, she holding it as her equitable estate. *Ib.* 536.
 20. *Same; investment of moneys, the wife's statutory separate estate, by the husband.*—The husband, in investing money, the statutory separate estate of the wife, may elect, the claims of creditors who had previously supplied the family with necessities not being involved, whether the investment shall be made in the name of the wife, continuing the character of the estate, or whether the investment shall be made in the name of himself, or of a stranger, as her trustee, to hold for her sole and separate use; and when such investment is made in the latter way, the value of the property thereby purchased, and held by her at the time of the husband's death, can not be computed in ascertaining her dower interest and distributive share in his estate. *Ib.* 536.
 21. *Transfer of policy of life insurance by the husband to the wife; character of estate thereby created.*—A transfer by the husband to the wife of a policy of insurance on his life, payable to him, as a gift, creates in the wife an equitable separate estate; and, she having collected the insurance money after his death, the amount thereof can not be computed, in estimating her dower interest and distributive share in his estate. (This case distinguished from *Williams v. Williams*, 64 Ala. 405.) *Ib.* 536.

See CHANCERY, 4, 5, 12.

FRAUDULENT CONVEYANCES.

JUDGMENTS AND DECREES.

INDICTMENT.

See CRIMINAL LAW.

INFANTS.

1. *Deed by infant; what necessary to a ratification.*—To constitute a binding ratification of a deed to lands executed by an infant, after he becomes of age, there must be some positive act, knowingly done, affirming the conveyance, or which is inconsistent with the right to repudiate it; mere inaction, unless for a time sufficient to perfect a bar, is insufficient. *Eureka Co. v. Edwards*, 248.
2. *Executory contracts of infants; may be avoided without tendering back what was received under the contract.*—If an infant, on becoming of age, disaffirms an *executory* contract, the adult purchaser or contractor being then forced to become the actor, to have the contract performed, the *quondam* infant is under no conditions or limitations in asserting the invalidity of the contract; the contract being voidable, and he making timely election to avoid by plead-

INFANTS—*Continued.*

- ing his minority, his defense, if sustained by the proof, will prevail, without his tendering back anything he may have acquired or received under the contract. *Ib.* 248.
3. *Executed contracts of infants; when tender essential to relief in equity.* But if the contract, as in this case, is executed, the rule in equity is different. Then the *quondam* infant, or any one asserting claim in his right, must become the actor; and coming into court in quest of equity, he must do, or offer to do equity, as a condition on which relief will be decreed him; and hence, if the money or other valuable thing received by the infant be still *in esse*, and in the possession of the infant or of the party seeking relief in his right, a bill seeking to avoid the contract need not tender, or offer to produce or pay, as the case may be. *Ib.* 248.
 4. *Same; when tender not required.*—Where, however, as in this case, the infant executed a deed to lands sold by him, and received and consumed the purchase-money during his infancy, a bill averring this fact, filed by one claiming the land under a deed executed by the infant, after he had attained his majority, to have the first deed cancelled as a cloud upon his title, need not tender back the purchase-money received by the infant. *Ib.* 248.
 5. *When notice of deed of infant, which he had disaffirmed, by a purchaser from infant after he had attained his majority, immaterial.* Where an infant, for a valuable consideration, which he received and used during his minority, executed a deed to lands, and disaffirmed it, and sold and conveyed the lands to another, after he became of age, the disaffirmance of the first deed destroyed all the claim, both legal and equitable, vested in the grantee thereunder, and left in him no pretense of any equity to assert against the later purchaser; and hence, the fact that such purchaser had notice of the first deed was immaterial. *Ib.* 248.

See CHANCERY, 47-8.

INSANITY.

See CRIMINAL LAW, 20-22, 52a-54.

INSURANCE, FIRE.

1. *Validity of parol contract of.*—A valid contract of fire insurance may be made in parol; and an action at law may be maintained on an agreement to insure, if all the terms were agreed on, so as to cover the time of the loss, and the breach consists in the failure to issue the policy. *Home Ins. Co. v. Adler*, 516.
2. *When agreement to insure void for uncertainty.*—A parol agreement to insure against loss by fire, which fixes the subject and sum of insurance, but is silent as to the rate of insurance, the duration of the policy, the payment of the premium or other material stipulations, is, by itself and unaided by previous dealings between the parties, void for uncertainty. *Ib.* 516.
3. *When verbal agreement to insure aided by previous policies.*—But where the agreement relates to insurance on merchandise and household goods in the storehouse of the party seeking the insurance, and he had previously obtained two annual policies on merchandise in the same storehouse, from the same agent, and in the same insurance company, as these former dealings between the parties showed the house in which the merchandise covered by the policies was kept, the rate of premium, the time for which the insurance had been obtained, and the many stipulations and details embodied in the policies, proof thereof would authorize the inference, that when the insurance was applied for, and the agent agreed to issue the policy, all the previous terms were impliedly

INSURANCE, FIRE—*Continued.*

- understood and adopted, except in so far as they were modified by the express terms of the verbal agreement; and hence, in a suit on the agreement to insure, after a loss by fire, the two former policies are admissible in evidence in aid of the agreement. *Ib.* 516.
4. *Recovery on policy issued after loss, in pursuance of prior parol agreement.*—If an application for insurance against loss by fire is made, and the terms agreed on prior to the loss, but the policy is not issued until after the loss, and the policy is so framed as to make the risk take effect from the date of the application, then a recovery may be had on the policy; but if, as in this case, the policy was not dated, and, on its face, was not made to take effect at any time, prior to its issue, there can be no recovery on the policy, on proof of an anterior parol agreement variant from, and not carried into the policy. *Ib.* 516.
 5. *Parol agreement to insure against loss by fire; when loss covered by.* A valid parol agreement made with a fire insurance company in October, that a policy for twelve months should be issued in the early part of November, would, *ex vi terminorum*, cover a loss occurring on the morning of the 19th of November. *Ib.* 516.
 6. *When preliminary proof waived.*—Letters written by the general agent, and by the resident agent of a foreign fire insurance company to the insured, notifying him that the company refused to pay the loss, placing the refusal on the express ground that there was no insurance on the property when it was destroyed, and making no allusion to the sufficiency or insufficiency of the preliminary proof of loss, are competent evidence to go to the jury, in a suit by the insured against the insurance company to recover the amount of insurance, on the question of a waiver of further preliminary proof, or of an implied admission that such proof was sufficient. *Ib.* 516.
 7. *Interest on.*—Where, by the terms of a contract of fire insurance, the insurance money is payable only at the expiration of two months after proof of loss, interest can not begin to run until that time has elapsed; and, in such case, the time when the proof of loss is furnished, is a question of fact, to be proved by the jury, and should be left to them by an appropriate charge. *Ib.* 516.
 8. *Limitation of risk to three-fourths of cash value.*—Under a clause in a policy of fire insurance that “in the event of loss by fire, the company should not be liable for more than three-fourths of the actual cash market value of the property insured, immediately prior to the loss,” the assured carries one-fourth of the risk, and can not recover, in the event of a loss, more than three-fourths of the actual cash market value of the insured property that was destroyed; and such policy covering two classes of property in the same house, insuring each class for a stated amount, neither class, if deficient in value, can be supplemented by excessive loss on the other. *Ib.* 516.
 9. *Unpaid premium a credit on amount recoverable on policy.*—In an action on a policy of fire insurance, the defendant is entitled to a credit for unpaid premium. *Ib.* 516.
 10. *Measure of recovery under provisions of policy.*—A policy of fire insurance on a stock of merchandise, which was partially destroyed by removal from a building in which it was exposed to loss by fire, and on which there was an additional insurance in another company, providing, (1) that “in case of any other insurance, . . . the assured shall be entitled to recover of this company no greater proportion of the loss sustained, than the sum hereby insured bears to the whole amount insured thereon;” and (2) that “when property insured by this company is damaged by removal from a building in which it is exposed to loss by fire, the damage shall be

INSURANCE, FIRE—*Continued.*

borne by the insured and insurers, in such proportion as the whole sum insured bears to the whole value of the property insured,"—*held*, in an action on the policy, that the insurance company thereby assumed the risk, not on any defined or definable portion of the stock, but on an undivided proportion of the whole stock, the proportion which the sum of insurance bore to the value of the whole stock; and that this was the measure of the plaintiff's recovery. *Teague v. Germania Fire Ins. Co.* 473.

See EVIDENCE, 42, 43.

INSURANCE, LIFE.

1. *Supreme Commandery of the Knights of the Golden Rule, a mutual life insurance company, and its certificate, entitled "Knight's Benefit Certificate," a contract of insurance.*—The Supreme Commandery of the Knights of the Golden Rule, a corporation created and organized under the laws of the State of Kentucky, is, in contemplation of law, a mutual life insurance company; and a certificate issued by that corporation, entitled a "Knight's Benefit Certificate," by which the corporation promises to pay a specified amount to the widow of the holder of the certificate, on his death, in consideration of his having become a member of the order, and having paid the fee for admission to membership, and of his payment in the future of all assessments levied and required by the corporation, on condition that he remained a member of the order, in good standing, and complied with all its laws then in force, or subsequently enacted,—has all the essential elements of a contract of life insurance by a mutual insurance company with one of its members. *Supreme Commandery, Knights of Golden Rule v. Ainsworth*, 436.
2. *Same; when a subsequent by-law providing a forfeiture of certificate made a part of contract.*—Where such certificate is silent as to the consequence, if the holder should die by his own hand, but recites that any violation of the "requirements of the laws now in force, or hereafter enacted, governing the order, or this class, shall render this certificate null and void," and that a condition upon which its obligation depends, is "the full compliance with all the laws of the order now in force, or that may hereafter be enacted;" and it was issued, and was accepted by the assured in writing, "subject to the laws of the order now in force, or which may hereafter be enacted by the Supreme Commandery;" and, at the time it was issued, there was a general law of the corporation, rendering it a condition upon which a certificate could issue, and upon which its benefits could be realized, that the member to whom, or upon whose life it was issued, should comply with the "general laws of the order then in existence, or which might thereafter be enacted;" but the by-laws contained no provision declaring an avoidance or forfeiture of the certificate in the event the holder should die by his own hands,—*held* that, by force of the recitals, stipulations and provisions above noted, a by-law, enacted by the corporation after the certificate was issued and accepted, providing that a certificate of this class should be forfeited if the member, *whether sane or insane*, should take his own life, entered into, and formed a part of the certificate, avoiding it in the event the holder, *whether sane or insane*, should take his own life. *Ib.* 436.
3. *Life insurance; meaning of the words, "takes his own life."*—The words, "takes his own life," when used in a clause of a policy of life insurance providing for a forfeiture, have a known and definite legal significance, importing *suicide*; that the policy holder must

INSURANCE, FIRE—*Continued.*

not become a *felo de se*; must not "deliberately put an end to his own existence, or commit any unlawful, malicious act, the consequence of which is his own death; and this implies that he must be "of years of discretion and in his senses." *Ib.* 436.

4. *Same; plea setting up the taking of life as a forfeiture; when insufficient.*—Hence, a plea to an action on a policy of life insurance, setting up a forfeiture, and averring, as a ground therefor, that the assured came to his death by taking his own life, is sufficient, although it is not averred that the self-destruction was willful, or that the assured was sane at the time he took his life. Such an act being averred, if it is intended to excuse it because of the mental unsoundness of the assured at the time of its commission, that fact, the matter of excuse, should be replied by the plaintiff. *Ib.* 436.
5. *Same; forfeiture of by suicide.*—A clause in a policy of life insurance, providing for a forfeiture in the event the assured should, while sane, take his own life, is the mere declaration or expression of the implication of the law; as such an event would operate a forfeiture in the absence of an express provision in the policy to that effect. *Ib.* 436.
6. *Same; may provide for forfeiture by assured taking his own life while insane.*—A life insurance company may lawfully stipulate in its policy for a forfeiture thereof, in the event the assured should take his own life while insane. *Ib.* 436.

See HUSBAND AND WIFE, 21.

INTEREST.

1. *On obligations payable on demand.*—Debts or obligations payable on demand do not bear interest until a demand is made, or suit is instituted; and hence, interest would run on such a contract only from a breach thereof. *Ragland v. Wood*, 145.

See EXECUTORS AND ADMINISTRATORS, 6-12.

INSURANCE, FIRE, 7.

HUSBAND AND WIFE, 10-11.

JUDGMENTS AND DECREES.

1. *Judgment by consent; what is.*—A recital in a judgment-entry, that the parties came by their attorneys, and by consent of defendants, the judgment was rendered against them, shows that the defendants, and not their attorneys, consented to the rendition of the judgment. *McNeil v. State*, 71.
2. *Judgments and decrees on the merits final and conclusive.*—No principle of law is better settled than that the judgment of a court of competent jurisdiction, rendered on the merits, as between the parties, is final and conclusive of the matter in controversy, so long as it remains unreversed; and this principle applies alike to the decrees of the court of chancery and the judgments of courts of law. *Tankersly, Adm'r, v. Pettis*, 179.
3. *Former adjudication; what issues covered thereby.*—When there is no question as to the jurisdiction of the court, or as to the identity of the parties, the inquiry, whether the subject-matter of the controversy has been drawn in question and is concluded by a former adjudication, is determined, when it is ascertained that the matters of the two suits are the same, and the issues in the former suit were broad enough to have comprehended all that is involved in the second suit. *Ib.* 179.

JUDGMENTS AND DECREES—*Continued.*

4. *Decree dismissing bill on the merits; effect of can not be avoided by showing that bill was unskillfully drawn.*—The force and effect of a decree of a court of equity dismissing a bill on the merits, can not be obviated by the complainant invoking his negligence or unskillfulness in pleading. *Ib.* 179.
5. *Judgments on contracts based on Confederate prices conclusive.*—A judgment rendered in 1871 on a promissory note executed in 1864, for purchase of personal property then bought at administrator's sale, is conclusive between the parties, and can not be assailed or scaled on account of Confederate prices. *Roberts v. Rice*, 187.
6. *Merger of judgment; what does not operate as.*—A judgment having been rendered against the husband for goods purchased by him, a portion of which consisted of articles of comfort and support of the household, etc., a condemnation of the wife's statutory separate estate to the satisfaction of a stated part of such judgment, covering only the value of the articles of comfort and support of the household, is not a merger of the original judgment, but is merely auxiliary to its collection; and it operates a payment only when, and to the extent it is made available. *Ib.* 187.
7. *Scire facias; can not be defended for errors behind the judgment.*—A *scire facias* to revive a judgment can not be defended because of matters going behind the judgment, or of errors, in the course of proceedings leading to its rendition; and hence, the failure to file a complaint in a suit commenced by an attachment, although an irregularity for which, on appeal, a judgment by default would be reversed, is no defense to a proceeding by *scire facias* to revive the judgment recovered in that suit. *Betancourt v. Eberlin, Adm'r*, 461.

See ATTACHMENT, 5-6.

CHANCERY, 20, 25, 30, 41, 44, 46.

ERROR AND APPEAL.

GARNISHMENT, 3.

HOMESTEAD, 7.

TAX SALES.

JURISDICTION.

See CHANCERY, 19.

EXECUTORS AND ADMINISTRATORS, 18-21.

NOTARY PUBLIC.

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS.

STATUTES.

JURORS AND JURY.

See CRIMINAL LAW.

JUSTICE OF THE PEACE.

1. *What act outside of his official duty.*—A justice of the peace, or notary public having the jurisdiction of a justice of the peace, before whom is pending a garnishment in aid of the collection of a judgment rendered by him, acts outside of his official duty in collecting from the garnishee, prior to judgment against him, the amount admitted in his answer to be due the defendant; and, in the absence of statutory provisions, the collection would impose

JUSTICE OF THE PEACE—*Continued.*

no liability on the sureties on the official bond of such justice or notary. *Mason v. Crabtree*, 479.

2. *When justice of the peace or notary public acts under color of office; liability of his sureties, and extent of recovery.*—But where the justice of the peace, or notary public having the jurisdiction of a justice, falsely represents and pretends to the garnishee that he had rendered judgment against him, and thereby pretends that he has the authority to receive the money, and, under such representation and pretense, collects the money, such justice or notary, being a bonded officer, and having authority under the statute to collect from the garnishee, on the rendition of a judgment against him, in collecting the money, commits a wrongful act under the color of his office, which renders him and his sureties liable under the statute (Code, § 179), in a suit brought against them by the defendant in the original judgment on which the garnishment is founded, for the restitution of the money; but the recovery in such case is limited to the money received, and interest thereon. *Ib.* 479.

See EVIDENCE, 45.

NOTARY PUBLIC.

LANDLORD AND TENANT.

1. *When attachment by landlord against tenant may be levied on crop of under-tenant.*—An attachment sued out by a landlord for the recovery of rent, the mandate of which runs merely against the crops of the tenant in chief, authorizes a levy of the writ, not only on the crops of the tenant in chief, but also on the crops raised on the rented premises by an under-tenant. *Agee v. Mayer Bros.*, 88.
2. *Tenant not allowed to dispute landlord's title.*—It is a well settled rule that a tenant is estopped from disputing his landlord's title, so long as he continues in possession of the demised premises; and hence, ordinarily, he must surrender the possession of the premises, before he can be heard to set up, or assert an outstanding title, adverse to that of his landlord. *Houston v. Farris & McCurdy*, 570.
3. *Unlawful detainer; when defendant can not set up title adverse to his landlord in defense.*—The plaintiff in an action of unlawful detainer, having derived title by purchase from a testator's sole devisee, the defendant, having entered under a lease from the plaintiff, can not, under the principle above stated, defeat a recovery by showing that he had been appointed administrator of the estate of the testator under whom the plaintiff derived title, and that the latter owed debts at the time of his death, some of which were still outstanding and unpaid. *Ib.* 570.
4. *Exception to rule prohibiting tenant from denying landlord's title; what not within.*—These facts do not show that the landlord's title had expired, or that it had been extinguished; and hence, the case does not come within the established exception to the general principle forbidding a tenant from disputing his landlord's title, that the tenant may always show that his landlord's title has expired, or been extinguished since the creation of the tenancy. *Ib.* 570.

See AGENCY.

LARCENY.

See CRIMINAL LAW.

LIMITATIONS, STATUTE OF.

1. *Bill in equity by creditor to set aside voluntary conveyance; when adverse possession for ten years by grantee a bar.*—Adverse possession for ten years by a grantee in a voluntary conveyance of land, executed while the grantor was surety on a guardian's bond, is, under the statute of limitations, a good defense to a bill filed by an administrator of the deceased ward, to have the conveyance set aside as fraudulent, and the land subjected to the payment of the guardian's liability to his ward. *Snedecor, Adm'r v. Watkins*, 48.
2. *Same.*—As the purpose of the proceedings in such case is not to obtain a personal judgment on the debt or liability, or to recover the land, but to have the grantee declared a trustee *in invitum*, it is immaterial that the right of the complainant to proceed against the surety of the guardian arose within ten years prior to the commencement of the suit. *Ib.* 48.
3. *Application of payment by creditor.*—When a debtor, owing more than one debt to a creditor, makes a partial payment, but does not direct its application, the creditor may apply it to any of the debts then due, and not barred by the statute of limitations. *Royston v. May*, 398.
4. *Same; when does not interrupt the running of the statute of limitations.* But when such application is made by the creditor, being the act of the creditor, in which the debtor does not participate, and of which he has no notice, it does not interrupt the running of the statute of limitations upon the debt to which the payment was applied. *Ib.* 398.
5. *Effect of partial payment.*—The statute gives to a partial payment the effect of removing or arresting the bar of the statute of limitations, only when it is made before the bar is complete; if the bar is complete, a partial payment will not remove it. *Curtis v. Daughdrill*, 590.
6. *Same; credits endorsed on note must be proved.*—Where the fact of a partial payment is disputed, an indorsement on a promissory note, purporting to be of a partial payment made at a time when the bar of the statute of limitations was not complete, is not evidence that the payment was made at the time specified. *Ib.* 590.
7. *Same; effect of credit indorsed on note, on demurrer to the evidence.* But where the bar of the statute is sought to be removed by a partial payment on a promissory note, on which a credit is indorsed, purporting to be a payment made before the bar of the statute was complete, and the credit is shown to be in the handwriting of the plaintiff, the payee of the note, and the note, with the credit thereon, is read in evidence without objection, the court, on a demurrer to the evidence interposed by the defendant, may infer, as the jury might, if the question had been left to their determination, that the payment was made at the time specified in the indorsement, thereby removing the bar of the statute. *Ib.* 590.

MADISON COUNTY.

1. *Solicitor's fees in county court of Madison county.*—For all convictions for misdemeanors in the county court of Madison county, whether commenced by affidavit and warrant in that court, or by indictment found in the circuit court and transferred to that court, the solicitor is entitled, under the act entitled "An act to regulate the trial of misdemeanors in Madison county," approved February 9th, 1877 (Pamphlet Acts, 1876-77, p. 149), to the same fees as for similar services in the circuit court. *Murphy v. State*, 15.

MANDAMUS.

See BILL OF EXCEPTIONS.

MECHANIC'S LIEN.

1. *Mechanic's lien for improvements on rented premises; extent of.* Where buildings or other improvements are erected on leased or rented land, at the request, and on the exclusive credit of the lessee, the statutory lien of the contractor extends not only to such improvements and erections as may be constructed by him, but also to the unexpired leasehold term of the premises on which the improvements are made, not exceeding one acre. *Rothe v. Bellingrath*, 55.
2. *Same.*—While the statute also extends such lien to the materials furnished, this involves the necessary implication that the materials must be capable of practical identification, when the lien is sought to be enforced specifically on them; and hence, where the materials are furnished to a lessee and are by him used in repairs on the rented premises, and are so merged in the freehold as to be incapable of severance, the contractor or material-man has no lien thereon, but merely a lien on the leasehold estate. *Ib.* 55.
3. *Same; taken subject to conditions in lease.*—Where the lien attaches to a leasehold interest, it is subject to all the conditions of the lease; and where the lease has been forfeited, the holder of the lien must pay to the lessor "all arrears of rent, or other money, interest and costs due under the lease," before he can acquire the rights of the lessee thereunder, even by purchase. *Ib.* 55.
4. *Rule of common law as to repairs on leased premises; statute to be construed in harmony therewith.*—At common law the burden of repairs was always cast on the tenant, and the landlord was under no implied obligation to keep the rented premises in repair; and the statute providing a lien in favor of mechanics and material-men for improvements erected on rented lands (Code of 1876, § 3443), must be construed in harmony with this principle, so far as its letter will permit. *Ib.* 55.
5. *When evidence of the amount due under the lease for rent or damages inadmissible.*—In a proceeding under the statute to enforce the statutory lien in favor of a material-man for materials furnished under a contract with the lessee, against the leasehold estate, the amount of the rent due the lessor by the lessee, or of any other moneys or damages accruing under the lease, is not a material issue; and hence, testimony tending to show that fact is immaterial and inadmissible on the trial, although it may become material after judgment in favor of the plaintiff, and a purchase of the leasehold estate thereunder. *Ib.* 55.

MERGER.

See JUDGMENT, 6.

MILL-DAM.

1. *Proceedings to erect mill-dam; notice to jurors.*—Where, in a proceeding under the statute for authority to erect a mill-dam, the sheriff, after selecting the jurors, and issuing notices for them to attend at the time and place designated, entrusted the notices for some of the jurors to the applicant to be served, who did serve them, and the jurors so notified attended and acted as jurors, this, in the absence of any statutory provision prescribing any particular mode in which the jurors were to be notified, and of injury resulting to the contestant, is not a reversible error. *Folmar v. Folmar*, 136.
2. *Same; effect of judgment of reversal on appeal.*—Where, in such a proceeding, this court, on appeal, reversed an order granting to the applicant authority to erect the dam, and remanded the cause, the order ceased to exist, and there was no necessity for the judge of probate to have entered of record the fact of reversal, or a revo-

MILL-DAM—*Continued.*

- cation of the order; and such order, having been reversed and annulled, could not be pleaded in bar or in abatement of further proceedings on the application. *Ib.* 136.
3. *Same; when application and writ sufficient.*—An application in such proceedings is not subject to demurrer on the ground that the place where the dam was to be erected is not definitely designated, when it avers that the applicant is the owner of the land on each side of the stream, the name of which is given, and the land is described by sectional subdivisions, township and range, and the side of the stream on which the mill is to be erected, is stated. *Ib.* 136.
 4. *Same; admissibility of testimony.*—In such a proceeding a question propounded by the applicant to a witness, calling for the purpose for which he examined the place where the dam was to be erected, and his answer thereto, that he examined it in reference to health, are permissible. *Ib.* 136.
 5. *Same; when findings of judge of probate will not be disturbed.*—Where, in such a proceeding, after the inquest of the jury had been returned to the judge of probate, he heard other evidence introduced by both the applicant and contestant before making an order for the erection of the dam, this court will not, on appeal, revise and reverse the conclusions and findings of the judge, unless they are manifestly unsupported by the evidence. *Ib.* 136.
 6. *Same; on contest, a suit inter partes, as well as in rem; costs.*—When the application in a proceeding to erect a mill-dam is contested, the proceedings assume the form and character of a suit *inter partes*, as well as *in rem*; and if the contestant is unsuccessful, he is properly taxed with the costs of the contest. *Ib.* 136.

MINORS.

See INFANTS.

MONEY.

1. *Title to, passes by delivery.*—Money and bank-notes current as money pass from hand to hand by delivery, possession of itself being sufficient evidence of title, upon the faith of which all persons dealing fairly may receive them, *Rice & Wilson v. Jones & Bro.*, 551.

See CONFEDERATE MONEY.

MORTGAGES.

1. *Sale of land under power contained in mortgage, where mortgagee becomes the purchaser; effect of.*—A sale of land under a power contained in a mortgage, at which the mortgagee became the purchaser, at a bid less than the mortgage debt, cuts off and bars the equity of redemption, and the mortgage debt is thereby satisfied and extinguished to the extent and amount of the mortgagee's bid, by mere operation of law; and thereafter the mortgagee can maintain an action at law to recover only so much of the debt as his bid may not have satisfied. *Harris v. Miller*, 26.
2. *Same; may be disaffirmed in equity by mortgagor.*—Such sale is binding on the mortgagee, and can only be disaffirmed at the election of the mortgagor, or those claiming under him, if seasonably expressed, and by them only in a court of equity. A court of law, looking only to the legal title vested in the mortgagee, and being incapable of adjusting the equities between the parties, and of granting the relief essential to a termination of all litigation, and to full and complete justice between them, can not avoid the sale. *Ib.* 26.
3. *Same; when bid less than debt, balance of debt a lawful charge under*

MORTGAGES—Continued.

- the statute of redemption.*—Where a sale of land is made under a power contained in the mortgage, and the mortgagee becomes the purchaser at a bid less than the amount of the mortgage debt, conceding that the statutory right of redemption extends to such a sale, a question not decided, the balance of the debt is a *lawful charge* on the land, which the mortgagor coming to redeem is bound, under the statute, to pay; and an offer to redeem which does not include such balance, is insufficient.. *Ib.* 26.
4. *Same; when tender insufficient.*—In such case a tender by the mortgagor of the amount bid by the mortgagee, with ten per cent. *per annum*, is insufficient, although accompanied by an offer to pay *all lawful charges*, where it is manifest that, in the use of the words "lawful charges" in the offer, he did not intend to include the balance due on the mortgage debt. *Ib.* 26.
 5. *Offer to redeem lands; effect on sale in court of law.*—Estoppels or ratifications resting merely in parol can not, in a court of law, affect the title to land; and hence, an offer to redeem land sold under a power contained in a mortgage, resting merely in parol, can not, in court of law, be deemed a ratification or confirmation of the sale, even if that court could inquire into the affirmance or disaffirmance of such sale. *Ib.* 26.
 6. *Notice of sale under power contained in a mortgage; what sufficient.* Posting a notice of sale at the court-house door, and another at the post-office, in the city of Opelika, is a strict compliance with a power of sale contained in a mortgage, which required that the sale should be advertised by posting notices thereof "in two public places in Lee county." *Edwards, Hudmon & Co. Meadows*, 42.
 7. *Redemption of lands by mortgagor; within what time allowed.*—An offer by a mortgagor to redeem lands sold under a power of sale contained in the mortgage, whether made by bill or otherwise, must be made within two years from the date of sale, unless the mortgagee was the purchaser; in that event a bill to set aside the sale and to redeem may be filed within a reasonable time, to be determined by the circumstances of each particular case. *Cooper v. Hornsby*. 62.
 8. *Parol sale of land under power contained in mortgage; mortgagor can not complain of.*—A mortgagor can not complain that a parol sale of lands by the mortgagee under a power contained in the mortgage is void, because it was not evidenced by writing as required by the statute of frauds. The benefit of this statute is not available without being specially pleaded, and if waived, and the contract is admitted or satisfactorily proved, it will be enforced. *Ib.* 62.
 9. *Same; equity of redemption cut off by.*—Such a sale is obligatory on the parties and valid so long as they treat it as binding, and it operates to cut off the mortgagor's equity of redemption, leaving in him merely the statutory right to redeem, which can only be asserted within two years from the date of the sale. *Ib.* 62.
 10. *Sale of lands under power contained in mortgage; payment of purchase-money.*—Whether a purchaser of lands under a power contained in a mortgage paid the purchase-money in lawful currency, or by a debt due him from the mortgagee, is a matter resting exclusively with them, with which the mortgagor is in no way concerned. *Ib.* 62.
 11. *When mortgagee of personal chattels not a trespasser.*—Under a power contained in a chattel mortgage authorizing the mortgagee, on default, to take possession of the mortgaged property without process of law, and to sell the same, the mortgagee has the right, after default, to enter upon the premises of the mortgagor, and, without his consent and against his will, to take possession of the property, provided he does so peaceably and without violence or other

MORTGAGES—*Continued.*

- breach of the public peace; and such taking, being the exercise of a right, will not constitute him a trespasser. (STONE, J., *dissenting.*) *Street v. Sinclair*, 110.
12. *When terms of mortgage can not be varied by parol.*—In a suit in equity for the foreclosure of a mortgage on land, it is not competent for the mortgagor to prove by parol evidence that he intended to convey an interest in the land different from that specified in the mortgage. *Cowley v. Shelby, Trustee*, 122.
 13. *Discharge of prior mortgage enures to benefit of junior mortgagee.* Where two mortgages on the same land are executed, the second or junior mortgagee acquires all the rights of the mortgagor, subject to the conditions of his mortgage, and to the prior incumbrance; and hence, the discharge of the prior mortgage, by a payment of the debt secured thereby, enures to the benefit of the junior mortgagee, and not to the benefit of the mortgagor. *Ib.* 122.
 14. *When secured note sufficiently identified.*—A note is sufficiently identified as being the note secured by a mortgage, when it is identical with the note described in the mortgage, as secured thereby, in dates, amount and in the names of the maker and payee, although, in the mortgage, the payee is described as trustee, while in the note the word *as* between the name of the payee and the word "trustee" is omitted: *Ib.* 122.
 15. *What does not constitute equitable mortgage.*—The fact that a promissory note given for the purchase-money of lands contains a description of the lands, does not create an equitable mortgage thereon for the unpaid purchase-money. *Prickett & Maddox v. Sibert, Adm'r*, 194.
 16. *Mortgage of personal chattels; right of mortgagee to possession.*—After default in the payment of a debt secured by mortgage, the mortgagee has the legal title and the right of immediate possession of chattels conveyed by the mortgage, authorizing a recovery thereof by him; and his right of possession is not affected by partial payments previously made by the mortgagor on the secured debt, unless it is so provided in the mortgage. *Burns v. Campbell*, 271.
 17. *Usury not available to mortgagor in trespass.*—In an action of trespass brought by the mortgagor against the mortgagee, for seizing personal property conveyed by the mortgage, usury is not available to the plaintiff for the purpose of showing, in connection with evidence of partial payments, that the mortgage debt has been paid, and the mortgage satisfied. *Ib.* 271.
 18. *Same.*—While a chattel mortgage is satisfied, and its lien extinguished, by payment of the mortgage debt, and a seizure by the mortgagee of the mortgaged property, after such payment, would constitute him a trespasser; yet, in an action of trespass brought against him by the mortgagor, founded on such seizure, no collateral investigation can be had into the usurious character of commissions charged by the mortgagee, who was a commission merchant, for selling cotton conveyed by the mortgage, in accordance with the terms thereof, for the purpose of showing a payment of the debt. *Ib.* 271.
 19. *Advances by mortgagee; what prices he may charge therefor.*—Under a mortgage securing future advances, the mortgagee is entitled to such prices as may be agreed on, or, in the absence of an agreement, to a fair and reasonable market valuation, estimated at the time and place of sale; and hence, evidence of prices paid by the mortgagee, purchasing at wholesale, at another time and place, is inadmissible. *Ib.* 271.
 20. *Parol mortgage; what is.*—A verbal agreement between a mortgagor and mortgagee, made after the execution of the mortgage, that it should embrace a horse furnished to the former by the latter, and

MORTGAGES—*Continued.*

stand as security for the price thereof, is valid, at least, *inter partes*, as a parol mortgage; and, in an action of trespass by the mortgagor against the mortgagee for seizing other chattels conveyed by the mortgage, the fact that the horse belonged to the mortgagee's son, who was also his agent, is not available to the plaintiff for the purpose of reducing the mortgage debt, and of showing that it was paid, if the son consented to such a disposition of his property. *Ib.* 271.

21. *When commissions agreed to be paid for selling mortgaged cotton not affected by sale through a broker at a lower rate.*—Nor can the mortgagor, in such action, be heard to complain, that the mortgagee, who was a commission merchant, employed a broker to sell for him the cotton shipped to him by the mortgagor, at a lower rate of commissions than that which the mortgagor agreed to pay him. *Ib.* 271.
22. *Chattel mortgage with power of sale; right of mortgagee to take possession under.*—When any part of the debt secured by a chattel mortgage, containing a power of sale, remains unpaid, the mortgagee may execute the power by taking possession of the property, provided he does so without committing a breach of the peace, or violation of the criminal law. *Ib.* 271.
23. *Confusion of goods; doctrine applies to mortgaged chattels.*—Where the owner of goods willfully, or through want of proper care, so mix or mingle them with the goods of another, that they can not be distinguished, the latter is entitled to the whole, unless he consented to the act; and this principle applies to mortgaged chattels, and a confusion thereof by the mortgagor with other chattels owned by him makes the whole *prima facie*, at least, subject to the lien and operation of the mortgage. *Ib.* 271.
24. *Mortgage of after-acquired property; when no specific lien thereby created.*—A mortgage of property to be thereafter acquired, which is not the product, increase, or accretion of something already owned by the mortgagor, especially when only general terms of description are used, creates no specific lien on such after-acquired property, but is merely an agreement to execute a further mortgage. *Ib.* 271.
25. *Foreclosure of mortgage on real estate by sale; when surplus considered as realty.*—When, on the foreclosure of a mortgage on real estate, a surplus remains after paying the mortgage debt, such surplus does not become personalty for the purposes of distribution among the next of kin, or of exemption to the decedent's widow or minor children, but, standing in the place of the equity of redemption, retains all the properties of realty. *Beard, Adm'r v. Smith, 568.*
26. *Surplus on foreclosure of mortgage on real estate; when widow not entitled to, as exempt.*—Hence, where a mortgage on real estate is foreclosed by sale after the death of the mortgagor, and a surplus, left after paying the mortgage debt, is paid to the administrator, the widow can not claim such surplus as personal property exempt to her under the statute. *Ib.* 568.
27. *Trial of right of property; mortgagee in mortgage of unplanted crop can not maintain.*—A mortgage of an unplanted crop does not pass to the mortgagee the legal title to the crop as it may be planted, or as it may come into existence; and hence, he can not maintain, on the title conferred by the mortgage, a statutory claim suit for recovery of the crop, if, when the crop comes into existence, a creditor of the mortgagor should seize it under legal process. *Columbus Iron Works Co. v. Renfro Bros., 577.*
28. *Same; when he may maintain.*—But the equitable title of the mortgagee under such mortgage may be converted into a legal title

MORTGAGES—*Continued.*

by some new act on the part of the mortgagor after the crop has come into existence, in ratification and confirmation of the mortgage, as by a delivery of the crop to the mortgagee, or to another for him; and when his title has been thus perfected, it will support a statutory claim suit for the recovery of the crop against an attaching or execution creditor of the mortgagor. *Ib.* 577.

29. *Mortgage on unplanted crop; what act amounts to confirmation.*—A delivery of the crop, after it has been gathered, to the agent of a railroad company for transportation to the mortgagee, is such a new act in ratification and confirmation of the mortgage as passes the legal title. *Ib.* 577.

See CHANCERY, 13, 24–26.

EJECTMENT, 1, 3, 4.

FRAUDULENT CONVEYANCES, 13, 14.

HOMESTEAD, 3–4.

HUSBAND AND WIFE, 12, 15.

VENDOR AND PURCHASER.

NATIONAL BANKS.

1. *Power to tax shares in for State purposes.*—National banks being the creatures of Congress, and the right of the States to tax any thing pertaining to them being wholly derived from the grant made by Congress, the power to tax shares in such banks for State purposes must be accepted with all the conditions and reservations annexed to its exercise. *Maguire v. Board of Rev. and Road Com'rs of Mobile County*, 401.
2. *Same; revisory power of Supreme Court of United States.*—The Supreme Court of the United States has the reserved power of revising, and if need be, of reversing the rulings of the State courts bearing on the exercise by the States of the power to tax shares in national banks; and hence, the decisions of that court on that subject must be adopted and followed by State courts. *Ib.* 401.
3. *Discrimination as to power of the States to tax capital stock of national banks, and shares therein.*—Touching the power conferred by Congress on the States to tax, that body has carefully discriminated between the capital stock of national banks, and the shares in such capital stock; the power to tax the former being withheld from the States, while the power to tax the latter is granted, with stated conditions and reservations. *Ib.* 401.
4. *Taxation of shares in national banks in this State prior to act of December 8th, 1880, not authorized.*—Prior to the passage of the act of December 8th, 1880 (Pamph. Acts, 1880–1, p. 7), there was no statute in this State which authorized the assessment of shares in national banks for taxes. *Ib.* 401.
5. *Taxation of shares in national banks; act of December 8th, 1880, not violative of act of Congress.*—The act of December 8th, 1880, providing “that there shall be levied and collected on the value of each share of every national banking association located within this State, whether held by residents or non-residents, the same rate of taxation as is levied on other moneyed capital, the same to be levied and collected in the county where each such association is located, and not elsewhere, and to be paid by each such association for the shareholders thereof,” is not rendered violative of the restrictions placed by the act of Congress on the power of the States to tax shares in such associations, by reason of subdivision 8 of section 362 of the Code of 1876, which provides only

NATIONAL BANKS—*Continued.*

- for the taxation of the excess of "all money loaned and solvent credits or credits of value," after deducting the tax-payer's indebtedness; but the language of the act, construed in connection with the above provision of the Code, allows and authorizes a deduction by the shareholder of his debts from the value of the shares owned by him, because the privilege of such deduction is allowed in the taxation of money loaned, and solvent credits or credits of value. *Ib.* 401.
6. *Same.*—Nor is the provision of the act of December 8th, 1880, requiring the taxes on such shares to be paid by the bank for the shareholders, violative of the act of Congress. *Ib.* 401.
 7. *Same; not affected by subd. 10 of 362 of Code.*—Subdivision 10 of section 362 of the Code, which declares that the capital stock of domestic corporations, except such portion thereof as may be invested in, and otherwise taxed as property, shall be subject to taxation, having no reference to the taxation of shares in the capital stock of such corporations, is not violative of the act of Congress restricting the power of the States to tax shares in national banks, as an unfriendly discrimination against such shares; nor is an assessment of such shares under the act of December 8th, 1880, thereby rendered invalid, because, in making the assessment, no deduction was allowed the shareholders for or on account of taxes paid by the bank on real estate or other property owned by it, and assessed for taxation. *Ib.* 401.
 8. *Second section of act of December 8th, 1880, unconstitutional.*—No legislative attempt having been made prior to the passage of the act of December 8th, 1880, to tax the shares of national banking associations, the second section of the act, providing that "there shall be assessed and collected in any county where such association is located, upon each share of the capital stock of such association which has escaped taxation for any preceding year since 1874, the same rate of taxation, State and county, as was in each year assessed and collected upon other moneyed capital," is violative of sections 4 and 5 of article 11 of the constitution, limiting the rate of taxation in any one year for State and county purposes. *Ib.* 401.

NEGLIGENCE.

See COMMON CARRIER.

RAILROADS.

WAREHOUSEMEN.

NEW TRIAL.

See REHEARING.

NOTARY PUBLIC.

1. *Notaries appointed to exercise jurisdiction of justices of the peace; extent of jurisdiction.*—Whatever of jurisdiction is conferred upon justices of the peace, and whatever of power or authority they may exercise in the administration of that jurisdiction, are conferred by the constitution on notaries public appointed by the Governor to "have and exercise the same jurisdiction as justices of the peace;" but such notaries are not thereby clothed with, nor can they exercise, those special powers granted to justices of the peace, which form no part of their jurisdiction, and which are not necessary to render that jurisdiction effectual. *Vann & Waugh v. Adams, Thorne & Co.,* 475.

NOTARY PUBLIC—*Continued.*

2. *Attachments returnable to circuit or city courts; notaries public, with jurisdiction of justices of the peace, have no power to issue.*—Notaries public appointed by the Governor to "have and exercise the same jurisdiction as justices of the peace," have no power or authority to issue an original attachment, returnable to the city or circuit courts; and hence, such attachment, thus issued, is void. *Ib.* 475.
3. *Notary public with justice's jurisdiction; power to issue attachments returnable before himself.*—A notary public with the jurisdiction of a justice of the peace has authority to issue an attachment returnable before himself for the collection of a demand within a justice's jurisdiction. *Rice & Wilson v. Watts*, 593.

NOTICE.

1. *When possession of real estate implied notice of vendor's title.*—The open possession of land by the tenant of a vendee who claims title under an unrecorded deed, operates as implied notice of the vendee's title to a creditor of the vendor, who, during the continuance of such possession, recovered judgment and purchased the land under an execution issued on the judgment; and such notice protects the vendee's title as effectually as the registry of his deed would have done. *Pique, Manier & Hall v. Arendale*, 91.

See ADVERSE POSSESSION, 4, 5.

FRAUD, 1.

FRAUDULENT CONVEYANCES, 14.

HUSBAND AND WIFE, 13-15.

INFANTS, 5.

MORTGAGES, 6, 10.

VENDOR AND PURCHASER.

OFFICE.

See AUDITOR.

JUSTICE OF THE PEACE.

OVERRULED CASES.

1. *Cobb v. Reed*, 2 Stew. 444, as to the time when an obligation for the delivery of personal property becomes payable in money, and foundation for suit, overruled in *Ragland v. Wood*, 145.
2. *Marshall v. Croom*, 60 Ala. 121, as to liability of fraudulent grantee for rents, overruled in *Kitchell, Adm'r v. Jackson*, 556.
3. *Martin v. Martin*, 35 Ala. 560, first principle stated in opinion declared unsound in *Eureka Co. v. Edwards*, 248.

PARTITION.

See CHANCERY, 6-8.

PAYMENT.

1. *Burden of proof.*—Where one claims that a debt, the prior existence of which is admitted or proved, has been paid by the substitution of another security, whether it be of higher or of the same dignity as the debt, he assumes the burden of proving that the substituted security was taken and accepted in relinquishment of the debt. *McWilliams v. Phillips*, 80.

PAYMENT—*Continued.*

2. *What a conditional payment merely.*—Where a creditor received from his debtor an order on a third party for lumber, deliverable at the latter's convenience, which was accepted, the presumption of law is, that the order was received as a conditional, and not as an absolute payment; and the condition on which the order was to operate as a payment, the delivery of the lumber, not having occurred, in the absence of evidence tending to show that any loss or injury resulted from the creditor's failure to make a demand for the lumber, the debtor is not entitled to a credit on the debt. *Ib.* 80.
3. *Application of.*—When a debtor, owing more than one debt to a creditor, makes a partial payment, but does not direct its application, the creditor may apply it to any of the debts then due, and not barred by the statute of limitations. *Royston v. May*, 398.
4. *Same.*—When a note gives to the payee a statutory or equitable lien on a crop to be grown by the maker for its payment, and a part of the crop is delivered to the payee, in the absence of instructions or agreement to the contrary, it is his duty to apply the proceeds of the sale thereof to the payment of the note. In such case the contract between the parties makes the appropriation, which can not be varied by the payee, without the consent of the maker. *Mahan v. Smitherman*, 563.

See LIMITATIONS, STATUTE OF, 4-7.

MORTGAGES, 10, 13.

PLEADING AND PRACTICE.

1. *Plaintiff suing as assignee of written contract for delivery of personal property must have and aver a written transfer.*—In order to authorize an assignee of a written contract for the delivery of personal property to sue in his own name, he must have a written transfer of the contract; and a complaint by such plaintiff which fails to show a written transfer is defective on demurrer. *Ragland v. Wood*, 145.
2. *Same; when complaint fails to show a written transfer.*—An averment in such complaint that the contract was "duly transferred" to the plaintiff is insufficient, as the transfer may have been by delivery merely, and not in writing. *Ib.* 145.
3. *Same; what averment sufficient.*—But an averment in the complaint that the contract was "duly assigned," is sufficient, as this must be construed to mean a transfer in writing. *Ib.* 145.
4. *Recovery on joint and several contracts.*—Under the statute (Code of 1876, §§ 2905, 2919), written obligations and promises of any description are several as well as joint; and in a suit against the obligors or promisors a recovery may be had against one or more of them, as the facts in evidence may justify. *Steed v. Barnhill*, 157.
5. *What amounts to general issue.*—A defendant can derive no greater benefit from an agreement of parties, that all matters which can be specially pleaded may be given in evidence under the general issue, than he could enjoy under the general issue without such agreement. *Burns v. Campbell*, 271.
6. *Demurrer to evidence; its effect.*—The effect of a demurrer to evidence is, as declared by statute, an admission upon the record, by the party demurring, of the truth of the evidence, and of every inference or conclusion the jury could legally deduce therefrom; and this is a mere affirmation of the well defined rule of the common law, that if a party voluntarily substituted the court for the jury, the court must render judgment against him, if the jury could have legally found a verdict against him. *Curtis v. Daughdrill*, 590.
7. *Same; effect of credit indorsed on note, on demurrer to the evidence.*

PLEADING AND PRACTICE—*Continued.*

Where the bar of the statute is sought to be removed by a partial payment on a promissory note, on which a credit is indorsed, purporting to be a payment made before the bar of the statute was complete, and the credit is shown to be in the handwriting of the plaintiff, the payee of the note, and the note, with the credit thereon, is read in evidence without objection, the court, on a demurrer to the evidence interposed by the defendant, may infer, as the jury might, if the question had been left to their determination, that the payment was made at the time specified in the indorsement, thereby removing the bar of the statute. *Ib.* 590.

8. *Trial of issues of fact by the court; special finding, when open for review in appellate court.*—Where, by agreement of parties, a jury is waived in a civil case, and the issues of fact are tried and determined by the court under the statute (Code, §§ 3029–31), and, at the request of one of the parties, the court makes a special finding, the sufficiency of such finding is open for review on appeal to this court. *Betancourt v. Eberlin, Adm'r, 461.*
9. *What necessary to support special finding.*—Like a special verdict, such special finding can not be aided by intendment, or by reference to extrinsic facts, but it must directly and affirmatively find every fact in issue, essential to the right of recovery, or judgment upon it can not be pronounced; but it must be confined and be responsive to the issue; and so far as it may pass beyond the issue and find facts either confessed or not denied, it is *pro tanto* impertinent and bad. *Ib.* 461.
10. *Same; when fact not in issue need not be found.*—Hence, where, in a proceeding by *scire facias* to revive a judgment after the lapse of ten years without the issue of an execution, a special finding was made by the court, in the absence of a plea of payment or an issue touching the satisfaction of the judgment, such finding is not insufficient because it fails to find that the judgment had not been satisfied, although, under the statute, the judgment must be presumed to be satisfied, and the burden of proving that it was not, is thereby made to rest upon the party seeking to revive. *Ib.* 461.
11. *Scire facias; can not be defended for errors behind the judgment.* A *scire facias* to revive a judgment can not be defended because of matters going behind the judgment, or of errors in the course of proceedings leading to its rendition; and hence, the failure to file a complaint in a suit commenced by an attachment, although an irregularity for which, on appeal, a judgment by default would be reversed, is no defense to a proceeding by *scire facias* to revive the judgment recovered in that suit. *Ib.* 461.
12. *Verdict; what sufficient.*—A verdict in favor of the plaintiff against “the defendant” in a suit where three persons are joined as defendants, is sufficient and will support a judgment against all the defendants. In such case the reasonable intendment is, that the word *defendant* was used for *defendants*, and it will be treated as a mere clerical misprision. *Steed v. Barnhill, 157.*

See ACTION.

AMENDMENT.

ATTACHMENT.

ERROR AND APPEAL.

INSURANCE, LIFE, 4.

LIMITATIONS, STATUTE OF.

TRESPASS.

TRIAL OF RIGHT OF PROPERTY.

PRINCIPAL AND AGENT.

See AGENCY.

PROHIBITION.

See CRIMINAL LAW.

PUBLIC LANDS.

See HOMESTEAD, 9.

PUBLIC RECORDS.

See AUDITOR.

RAILROADS.

1. *Right of owners of domestic animals to allow them to run at large; doctrine of common law in reference to, does not prevail in this State.* The doctrine of the ancient common law, that the owner of domestic animals must keep them in his close, and can not, without becoming a trespasser, suffer them to run at large upon the unenclosed lands of others, never prevailed in this State; and hence, an owner of such animals can not be regarded as a trespasser, or as contributing to their injury, if he suffers them to go at large, and they wander upon an unenclosed railroad, and are there injured by a passing train. *Ala. Great Sou. R. R. Co. v. Jones, 487.*
2. *Injury to stock by railroad company; ordinary and reasonable care and diligence must be exercised by company.*—A railroad company has the undoubted right to the free, unmolested and exclusive use of its road for the purposes for which it is appropriated; and, if under all the circumstances, ordinary and reasonable care and diligence are exercised to avoid injury to domestic animals found upon the road, the duty to which it is subject is performed; and for injuries which are unavoidable, it can not be made liable. *Ib. 487.*
3. *Reasonable care and diligence; when a question of law, and when of fact.*—Whether ordinary and reasonable care and diligence have been, in a particular case, observed, or omitted, is generally a mixed question of law and fact. When the facts are not disputed, and the deductions or inferences to be drawn from them are indisputable; or when the standard and measure of duty are fixed and defined by law, are the same under all circumstances, the question is for the decision of the court; but if the facts are disputed, or, if not disputed, the existence of negligence is an inference which, as mere matter of discretion and judgment, may or may not be drawn from them, the question must be submitted to the jury. *Ib. 487.*
4. *Failure to employ good and safe machinery, etc., evidence of negligence.*—It is the duty of railroad companies to adopt the best precautions against danger which are in use, and to procure and employ good and safe machinery and appliances, such as are most in use, and approved by the skillful and experienced in the operation of trains, and in the management of railroads; and the omission of this duty is, at least, evidence of negligence. *Ib. 487.*
5. *Defective head-light evidence of negligence.*—Hence, in an action against a railroad company for damages, done to stock by its train, a charge, given at the plaintiff's request, instructing the jury, in substance, that if they believed from the evidence that, at the time of the accident, it was a starlight night, and the train was running at the rate of twenty-five miles per hour, and could not have been stopped by the use of all proper means, in a less space than one

RAILROADS—*Continued.*

hundred and twenty yards, and that the head-light used on the locomotive only enabled the engineer to see the road about fifty or sixty yards ahead, and the stock so injured were on the track, and could have been seen, had the proper light been provided, and proper vigilance been exercised, in time to have prevented the injury, then they would be authorized to find the defendant guilty of negligence,—is free from error. *Ib.* 487.

6. *Injury to stock by railroad company; allowing stock to run at large not contributory negligence.*—Apart from the influence of any special statute, the law in this State is, that it is not such contributory negligence for the owner of stock to suffer them to run at large, as to prevent him from recovering damages for injuries negligently done to them by persons or corporations owning or controlling railroads. *Ala. Great Sou. R. R. Co. v. McAlpine & Co.,* 545.
7. *Same; rule as to contributory negligence not changed by local act of February 28, 1881, (Pamph. Acts, 1880-1, p. 223).*—This rule as to contributory negligence in such cases is not changed by the act of February 28th, 1881 (Pamph. Acts, 1880-1, p. 223), making it unlawful for stock to run at large in a designated territory, subjecting the owner to damages committed by such stock to the lands, crops, etc., and declaring the owner or manager of stock who knowingly suffers them to run at large guilty of a misdemeanor. *Ib.* 545.
8. *Same; owner of stock allowing them to run at large in violation of local statute, not debarred of right of recovery.*—The fact that the owner of stock, in allowing them to run at large, is guilty of a violation of a local statute, making it unlawful for stock to run at large within a designated territory, does not preclude him from recovering damages against a railroad company for injuries done to the stock within such territory, while at large, by defendant's train. In such case the plaintiff's unlawful act did not contribute to the injury, and he does not require any aid from it to establish his cause of action. *Ib.* 545.
9. *Degree of diligence required.*—The law exacts of railroad companies, and other common carriers, in their use of steam power, extraordinary diligence, or "that degree or diligence which very careful and prudent men take of their own affairs"; and while there are authorities which confine this rule of diligence to the transportation of passengers, such is not the law in this State. *Ib.* 545.
10. *Blowing whistle or ringing bell before reaching station or public road.* Under the statute (Code of 1876, § 1699,) no duty is imposed on the engineer in charge of a locomotive running on a railroad to blow the whistle or ring the bell until the locomotive comes within one-fourth of a mile of a road-crossing or regular depot or stopping place; and hence, a charge, given at the request of a plaintiff in an action against a railroad company for damages to stock, which assumes the existence of such duty at a time when the statute does not require its observance, is erroneous. *Ib.* 545.

See COMMON CARRIER.

REDEMPTION.

See MORTGAGES, 1-7.

REHEARING.

1. *Rehearing under the statute; when applicant not without fault.* Where a claimant of personal property levied on under an execution attended court on Wednesday and Thursday of the first week of the term to which the execution was returnable, with his testi-

REHEARING—*Continued.*

mony and attorney, ready to attend to the claim suit, but finding that the cause had not been docketed, he and his attorney left; and afterwards, on another day of said term, in the absence of the claimant and his attorney, and without notice to them, the cause was placed on the docket and on the same day, without his testimony, tried, another attorney who had been employed by the claimant in other cases, but not in the claim suit, through mistake, and without the claimant's knowledge, appearing for, and representing him, of which the claimant knew nothing until after the adjournment of the court,—*held*, that the claimant was not without fault, and hence, was not entitled to a rehearing under the statute, although he had a meritorious defense to the suit. *Renfro Bros. v. Merryman & Co.*, 195.

REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS.

1. *Section 641 of U. S. Revised Statutes construed.*—Section 641 of the Revised Statutes of the United States, providing for the removal into the Federal courts of civil suits or criminal prosecutions commenced in a State court against any person who is denied, or can not enforce therein any right secured to him by any law providing for the equal civil rights of citizens of the United States, etc., was intended only to afford protection against an infringement of the equal rights of citizens of the United States by State action, and by that action alone; and does not refer "to other obstructions of right, such as personal or class prejudice, or political feeling and the like." *Ex parte The State*, 363.
2. *Same.*—Hence, the existence, in the locality in which an indictment for crime may be found against a colored person, of a sentiment and prejudice hostile to him because of his race and color, is not a cause, under that statute, for the removal of the indictment for trial from the State to the Federal court. *Ib.* 363.
3. *Same; jurisdiction of State court not ousted by the mere filing of an application for removal.*—The jurisdiction of the State court is not ousted by a mere application for the removal of a cause, civil or criminal, pending therein, to a Federal court; but it is only when the application is in proper form, conforms to the act of Congress authorizing the removal, and states facts bringing the case within the provisions of the act, that it becomes the duty of the State court to yield obedience to the paramount law, and to cease the exercise of its original jurisdiction. *Ib.* 363.
4. *Same; jurisdiction of State court to pass on application for removal.* The State court, in such case, has an unquestioned jurisdiction to determine, upon the application for the removal, whether a case was thereby presented which required that it should cease jurisdiction and transmit the cause to the Federal court for final trial; but its determination of that question is subject to the jurisdiction and judgment of the Federal court, when the case finds its way into that court. *Ib.* 363.
5. *Same; jurisdiction of Federal court to pass on question of removal; effect of its determination.*—When the case has been, by the order of the State court, transmitted to the Federal court, upon that court devolves the duty of determining its own jurisdiction. In determining this question, it is not concluded or affected by the judgment of the State court having original jurisdiction; and the conclusion of the Federal court, that the application does not give it jurisdiction, and its judgment remanding the cause to the State court, is binding upon the latter court. *Ib.* 363.
6. *Same; condition of cause on remandment by the Federal to the State court.*—In such case, the Federal court not having acquired, the

REMOVAL OF CAUSES—*Continued.*

State court could not lose, jurisdiction by the erroneous order of removal; and hence, when the cause is remanded to the State court, it is in the same plight and condition as it was in when the order of removal was entered. *Ib.* 363.

RENTS.

1. *When a part of the freehold.*—The rule is, that, on the death of the owner of lands, rent, not then due, is not a *chose in action*, but is a part of the realty, and passes with the reversion of the freehold, as a mere incident, to those entitled. *Gayle v. Randall*, 469.

See CHANCERY, 5.

FRAUDULENT CONVEYANCES, 11, 12.

BANKRUPTCY, 2.

REVIVOR.

See JUDGMENTS AND DECREES, 7.

SALES.

1. *Sale of personal property; what not a delivery.*—Where one agreed to sell to another a threshing-machine which had been loaned to, and was in the possession of a third party, and gave to the purchaser an order on the party in possession for the machine, the purchaser executing his note for the purchase-money,—*held*, in the absence of proof that the parties so intended, that this did not constitute a delivery of the machine, or vest the title thereto in the purchaser. *Edwards, Hudmon & Co. v. Meadows*, 42.
2. *Same.*—To constitute a delivery in such case, the party in possession must deliver the machine, or consent to attorn to the purchaser so as to become his bailee. *Ib.* 42.
3. *Same; waiver of delivery.*—If the purchaser in such case voluntarily consents to let the party in possession retain the machine for a definite period of time, as a matter of favor, this will operate a waiver of the delivery; but no such waiver can be implied from the fact, that the purchaser, acting under the moral coercion of necessity dictated by the situation, as where the bailee refuses to deliver until he has finished a certain amount of work, or agrees to deliver only after he has finished the work, merely submits to the bailee's continued possession as the best arrangement he can make under the circumstances. The party in possession does not thereby become the bailee of the purchaser, but he continues his original custody of the machine as the bailee of the vendor. *Ib.* 42.
4. *Contract of sale of specific chattels; when complete.*—A sale of specific chattels in the possession of the seller is complete, and the title passes to the purchaser, when the parties agree upon the terms of sale, although the actual possession may not pass, and the purchaser may not be entitled to it, until he pays the price, or performs some other like stipulation. *Pilgreen v. State*, 368.
5. *Same; delivery to common carrier.*—A delivery of goods to a carrier for the buyer, in accordance with his specific request, is a delivery to the buyer. *Ib.* 368.
6. *Same; relation of the common carrier to the parties.*—When goods are forwarded through an express company, by instructions of the purchaser, marked "C. O. D.," the carrier is the agent of the purchaser to receive the goods from the seller, and the agent of the seller to collect the price from the purchaser; and the sale is complete when the goods are delivered to the carrier. *Ib.* 368.

SCHOLARSHIP.

See CONTRACTS, 7-10.

SET-OFF.

1. *By surety of debt due principal ; when not available.*—Sureties, when sued alone, can not, without the consent of their principal, avail themselves, by way of set-off, of a debt due from the plaintiff to the principal at the commencement of the suit. *Beard v. Union & Amer. Pub. Co.* 60.

SHERIFF.

See EXECUTORS AND ADMINISTRATORS, 25, 26.

SOLICITOR.

See MADISON COUNTY.

SPECIFIC PERFORMANCE.

See CHANCERY, 18, 21, 22.

STATUTES.

1. *Construction of.*—A statute ought to be so interpreted as to give to each clause, if possible, some meaning. *Ex parte Dunlap*, 73.
2. *When not affected by change in language.*—The words, “unless called to testify thereto by the opposite party,” were incorporated in the former statute (Rev. Code, § 2704) merely from abundant legislative caution, in recognition of a right which would otherwise have existed ; and hence, the omission of these words from the statute, by subsequent amendment, can not be construed as a legislative intention to abrogate the right. *Dudley, Adm’r, v. Steele*, 423.
3. *Same.*—No rule of statutory construction rests upon better reasoning than that, in the revision of statutes, alteration of phraseology, the omission or addition of words, will not necessarily change the operation or construction of former statutes ; but to have this effect, the language of the statute as revised, or the legislative intent to change the former statute, must be clear. *Landford v. Dunklin, et al., Adm’rs*, 594.
4. *Same.*—The words, “and not to the person,” as used in the act of December 24th, 1822, declaring that a former statute authorizing the grant of letters of administration to the sheriff or coroner should be strictly construed, and that the administration should attach to the office, *and not to the person*, were employed in the abundance of legislative caution ; and hence, the omission of these words from the statute as codified in the Code of 1852, and the Codes subsequently adopted, does not change the operation or construction of the statute. *Ib.* 594.
5. *Exemption of State from operation of.*—Exemption from the operation of general statutes is a State prerogative, and does not extend to counties. *The State for the use, etc. v. Allen*, 543.

STOCK.

1. *Act of December 8th, 1880, construed ; character of lien thereunder.* The act of December 8, 1880 (Acts, p. 260), makes it unlawful for the owner of certain named stock to voluntarily permit such stock to go at large off his premises in designated portions of Montgomery county, and provides that he shall be liable to every person injured for all damages done by the stock, when at large, to fruit or shade trees, shrubbery or crops, and further provides that a

STOCK—*Continued.*

judgment obtained for such damages "shall be a lien on the stock causing such injury, in addition to other liens which an execution on such judgment may have according to law." *Held*, that the lien thereby provided for does not arise by operation of law from the act done, or the injury sustained, but depends upon the subsequent reduction of the claim to judgment. *Lehman, Durr & Co. v. Ferrell*, 458.

2. *Extent of lien thereby provided.*—Such lien can only be commensurate with the ownership of the person by whose voluntary permission the stock was at large; and hence, it is subordinate to the lien of a prior recorded mortgage, executed by such owner. *Ib.* 458.

See RAILROADS.

SUMMARY JUDGMENTS.

1. *Summary judgment against county treasurer for failing to pay allowed claim; when motion insufficient.*—The summary remedy against a county treasurer for failing to pay a claim against the county under the provisions of section 3595 of the Code, can only be maintained when the demand sued for is an "allowed claim" against the county; and hence, a motion which fails to aver that such claim had been allowed, is insufficient on demurrer. *Cohen v. Coleman*, 496.
2. *Claim against county; when must be audited.*—An order of the court of county commissioners, declaring a named person a pauper, and allowing for her support a designated sum per month, "payable monthly out of any money in the treasury not otherwise appropriated," but not designating, or contracting with any particular person therefor, does not authorize the judge of probate to draw his warrant on the county treasurer in payment of a claim for the support of such pauper, at the rate specified in the order, in favor of the party rendering the service; but before such order can legally be drawn, the claim must be audited and allowed by the court of county commissioners. *Boothe v. King*, 497.
3. *Warrant of judge of probate; when not an audited and allowed claim against the county.*—Hence, a warrant drawn by the judge of probate, under such order, for the support of the pauper, before the claim therefor has been audited and allowed by the court of county commissioners, will not support a summary proceeding under the statute (Code, § 3395) against the county treasury for failing to pay it as an allowed claim against the county. *Ib.* 497.

SURETIES.

1. *When released by extension of debt.*—When a note, payable twelve months after date, is taken for an existing debt, the right of action on the debt is thereby suspended until the maturity of the note, although there may be no express agreement to that effect; and sureties on the original debt are thereby released, unless they assented to the arrangement. *Mobile Life Ins. Co. v. Randall*, 220.

See SET-OFF.

TAXES.

See EXECUTORS AND ADMINISTRATORS, 17.

NATIONAL BANKS.

TAX SALES.

TAX SALES.

1. *Sale of land for taxes; validity of; by what law governed.*—The validity of a sale of lands for the payment of delinquent taxes must be determined by the law of force at the time the sale was made. *Driggers. v. Cassady, 529.*
2. *Same; jurisdiction of probate court to order, limited, and must appear of record.*—The probate court being a court of limited jurisdiction in the matter of the sale of lands for the payment of delinquent taxes under the provisions of the act of February 12, 1879 (Pamph. Acts, 1878-9, p. 1), to sustain such a sale, it must affirmatively appear of record that the court had jurisdiction both of the subject-matter and of the person. *Ib. 529.*
3. *Same; when jurisdiction of the person sufficiently appears.*—A judgment-entry of the probate court, subjecting lands of a non-resident to sale for the payment of delinquent taxes, which, following the form prescribed by statute, recites that "notice has been given as required by law, is sufficient under the act," although under its express provisions, the land-owner was entitled to notice by publication in a newspaper published in the county in which the lands lie. *Ib. 529.*
4. *Same; judgment can not be collaterally assailed for mere irregularities.*—While great accuracy is exacted, and strict rules are applied for the protection of the tax-payer, such proceedings are not exempted from the influence of the principle forbidding the collateral assaillment of judgments for mere irregularities, or on any ground which could have been pleaded in defense. *Ib. 529.*
5. *Same; judgment conclusive as to defenses which could have been made on the trial.*—While it would have been a full defense to such a proceeding, if it had been shown on the trial that the tax-payer, or any one for him, had tendered to the collector the full amount of the delinquent taxes due by him, or that he had in his possession, in the county, a sufficient amount of visible personal property, out of which the taxes might have been realized by the collector, the failure to make these defenses in the probate court is conclusive on him and those holding under him; and the judgment of condemnation can not afterwards be collaterally assailed on either of these grounds. *Ib. 529.*
6. *Lien of the State on land for taxes; extent of; when tender insufficient.* The State has, under the statute, a preferred lien on the lands of a tax-payer for all unpaid taxes; and hence, a tender by such tax-payer, of the amount of the taxes due on the lands, without including the owner's poll-tax and the delinquent taxes due on his personal property, is insufficient, and will not constitute a defense to proceedings in the probate court to condemn the lands for the payment of the delinquent taxes due by him. *Ib. 529.*
7. *Same; when it attaches; not affected by subsequent alienation.*—The lien of the State for taxes attaches to lands under the statute (Code, § 375), on the first day of January of the year for which they were assessed; and it is not affected by a subsequent alienation, although made prior to a sale for the payment of the taxes, and to a bona fide purchaser for value, and without notice. *Ib. 529.*
8. *Sale of lands for taxes; when description sufficient.*—Where lands are described in the assessment list and in the proceedings in the probate court to subject them, under the statute, to sale for the payment of delinquent taxes "as two hundred acres, known as the lands of the late Israel Wiggins, deceased," the description is sufficient, parol evidence being allowed in aid of identification. *Ib. 529.*
9. *Same; when void for uncertainty of description.*—An assessment of lands for taxes, in which the lands are described as "two hundred acres of land lying in Dale county," is void for uncertainty; and

TAX SALES—*Continued.*

proceedings in the probate court to subject the lands to sale for the payment of the taxes, based on such assessment, are also void. *Ib.* 529.

10. *Same; description in assessment list can not be varied.*—The jurisdiction of the probate court in such case depending upon the validity of the assessment, and the statute requiring that the sale must be made according to the description in the assessment list, which description must be copied in the docket filed by the collector with the probate judge, a description in such list and docket which renders the assessment void, can not be aided by a more perfect description in the judgment of condemnation, and subsequent proceedings. *Ib.* 529.

TRESPASS.

1. *Trespass for assault and battery; admissibility of matters of provocation.*—In an action of trespass for an assault and battery, the defendant can not give in evidence, in mitigation of damages, matters of provocation on the part of the plaintiff, unless they happened contemporaneously with the assault and battery, or so recently prior thereto as to induce the presumption that the assault was committed under the immediate influence of the passion excited by the provocation. *Keiser v. Smith*, 481.
2. *Same; "cooling time" the test as to the admissibility of provocation.*—In such case the test is, whether the "blood had time to cool," or, in other words, whether there was reasonable cooling time between the giving of the provocation, and the commission of the assault and battery. *Ib.* 481.
3. *Same; cooling time a question for the court.*—Whether there is reasonable cooling time in such case, is a question of law, to be decided by court, and not of fact, to be determined by the jury. *Ib.* 481.
4. *Same; when provocation not admissible.*—Held, under the principles above stated, and the facts of this case, that a libel, published in plaintiff's newspaper in the morning of the day on which the plaintiff was assaulted, the assault having been committed in the afternoon, was inadmissible in mitigation of damages. *Ib.* 481.
5. *When mortgagee of personal chattels not a trespasser.*—Under a power contained in a chattel mortgage authorizing the mortgagee, on default, to take possession of the mortgaged property without process of law, and to sell the same, the mortgagee has the right, after default, to enter upon the premises of the mortgagor, and, without his consent and against his will, to take possession of the property, provided he does so peaceably and without violence or other breach of the public peace; and such taking, being the exercise of a right, will not constitute him a trespasser. (STONE, J., *dissenting.*) *Street v. Sinclair*, 110.
6. *Trespass de bonis asportatis; measure of damages.*—In trespass *de bonis asportatis*, founded on a mere wrongful taking, unaccompanied by any act of wantonness, malice or gross negligence, the measure of damages is the value of the plaintiff's interest in the property at the time of the trespass, and not the value of the property itself. *Ib.* 110.
7. *Same.*—Hence, in such action brought by a mortgagor against a mortgagee for the wrongful taking of the property conveyed by the mortgage, the defendant is entitled to prove, in mitigation of damages, the amount due on the mortgage debt. *Ib.* 110.
8. *When damages are too remote.*—In trespass for wrongfully seizing and carrying away plaintiff's live stock while he was engaged in farming, damages resulting therefrom to his farming operations are too remote, speculative and contingent to be recovered. *Ib.* 110.

TRESPASS—*Continued.*

9. *Usury not available to mortgagor in trespass.*—In an action of trespass brought by the mortgagor against the mortgagee, for seizing personal property conveyed by the mortgage, usury is not available to the plaintiff for the purpose of showing, in connection with evidence of partial payments, that the mortgage debt has been paid, and the mortgage satisfied. *Burns v. Campbell*, 271.
10. *Same.*—While a chattel mortgage is satisfied, and its lien extinguished, by payment of the mortgage debt, and a seizure by the mortgagee of the mortgaged property, after such payment, would constitute him a trespasser; yet, in an action of trespass brought against him by the mortgagor, founded on such seizure, no collateral investigation can be had into the usurious character of commissions charged by the mortgagee, who was a commission merchant, for selling cotton conveyed by the mortgage, in accordance with the terms thereof, for the purpose of showing a payment of the debt. *Ib.* 271.
11. *Trespass de bonis asportatis by the husband; damages to goods of the wife can not be recovered in.*—In trespass by the husband against his mortgagee for an alleged illegal seizure of goods under the mortgage, the plaintiff can not recover damages for a seizure of goods belonging to the *corpus* of the wife's statutory separate estate; but for such damages the wife must sue alone. *Ib.* 271.
12. *Evidence; res gestæ.*—In an action of trespass by the mortgagor against the mortgagee and his agent for a seizure under a power of sale in the mortgage, of mortgaged chattels, the written notice of sale, and the sale itself of the chattels by the agent, are admissible in evidence, being merely cumulative evidence of the intention of the agent in taking the goods, and, as such, a part of the *res gestæ* of the alleged trespass, shedding light on the dominion over the goods previously asserted. *Ib.* 271.
13. *Measure of damages.*—In trespass for taking goods, if the taking is merely unlawful, the measure of damages is, generally, the value of the goods, or amount of injury done to them, as the case may be, with interest to the date of judgment; but if the taking is perpetrated in a rude, wanton, reckless, or insulting manner, or is accompanied with circumstances of fraud, malice, oppression, or aggravation, or even with gross negligence, the party injured is entitled to receive exemplary damages. *Ib.* 271.
14. *Malice of agent as affecting damages against principal.*—The rule is, that, where several defendants are sued in tort for damages, the malice or other evil motive of one can not be matter of aggravation, or ground of vindictive damages against the other; and hence, principals are not generally held liable for such damages by reason of the evil motive of the agent, unless the act of the agent was fully ratified with a knowledge of its malicious, aggravating, or grossly negligent character; or these matters of aggravation were probably consequent on the doing of the wrongful act ordered by the principal; or unless the agent was employed with a knowledge of his incompetency. *Ib.* 271.
15. *When letter by agent is admissible in action of trespass against principal and agent.*—In an action of trespass against principal and agent, for the seizure by the agent of plaintiff's goods, a letter written by the agent two days before the seizure, directed to the plaintiff, and received by him in due course of mail, and endorsements made on the envelope by the agent, evincing an unfriendly feeling towards the plaintiff, is relevant and competent, on proof of handwriting, as tending to show malice or an evil motive on the part of the agent, which may have entered into, or given color to the transaction. *Ib.* 271.
16. *Evidence of malice; when inadmissible.*—In trespass against princi-

TRESPASS—*Continued.*

pal and agent, founded on the seizure by the agent of goods of the plaintiff under a mortgage to the principal, where it is sought to charge the latter by reason of a subsequent ratification of the agent's act, the fact that the principal commenced a criminal prosecution against the plaintiff about the time of the seizure, is not competent evidence for the plaintiff, in the absence of all evidence tending to show the principal's original participation in the agent's act, or that he originally authorized it, although such fact may tend to show malice against the plaintiff on the part of the principal. In such case, the prosecution is not a part of, or connected with the transaction alleged to have been ratified, and the malice, standing alone, is not competent to authorize the inference, that the principal conferred an original or previous authority upon the agent to make the seizure. *Ib.* 271.

17. *Same.*—In such action it is not competent for the plaintiff to show, by way of aggravation of damages, that he had a family, consisting of a wife and several minor children, at the time of the seizure of his goods by one of the defendants. *Ib.* 281.
18. *When destitute condition of plaintiff's family, caused by the trespass, not competent evidence.*—Nor is it competent, in such action, to show that the plaintiff's family, then at a distant place, to which plaintiff intended moving, were in a destitute condition as to clothing, bedding or furniture, caused by the seizure of his goods by the defendant, without proof of knowledge by, or notice to the defendant of such condition at the time the goods were seized; but the knowledge of such facts by the defendant, or information charging him with notice thereof, would tend to show an evil motive, such as would constitute a circumstance of oppression or aggravation. *Ib.* 271.
19. *Good or bad faith an issue, when punitive damages are claimed; what evidence is competent to show good faith.*—Exemplary damages being punitive and preventive in their purpose, as well as compensatory, the good or bad faith of the defendant is always a vital issue where such damages are claimed; and hence, in an action for trespass brought by a mortgagor against a mortgagee and his agent for the seizure by the agent of goods under power of sale contained in the mortgage, it is competent for the defendants to show, in mitigation of exemplary damages claimed in the action, that the agent had good reason to believe and did believe, that a part of the mortgage debt remained unpaid, and that the goods seized under the mortgage belonged to the plaintiff, and were conveyed by the mortgage; but such evidence is not admissible in mitigation of actual damages. *Ib.* 271.
20. As to ratification of agent's trespass by principal, see AGENCY, 1-6, 10.

See MORTGAGES, 16, 19-24.

TRIAL OF RIGHT OF PROPERTY.

1. *Venue as to property levied on under attachment.*—When an attachment is levied in a county different from that in which it was issued, and a claim to the property is interposed, the statute (Code of 1876, § 3290) requires that the trial of the right of property must be had in the county in which the attachment was levied. *Ex parte Dunlap*, 73.
2. As to right of mortgagee of unplanted crop to maintain, after crop has been gathered, see MORTGAGES, 27-29.

TRUSTS AND TRUSTEES.

1. *Resulting trust; how created.*—Where a man buys land in the name of another, and pays the consideration-money, in the absence of all rebutting circumstances, the land will be held by the grantee in trust for him who pays the consideration-money. This trust results, by mere presumption of law, without any proof of the actual intention of the parties, from the fact that one pays the consideration-money, while the other receives the title. *Rose v. Gibson*, 35.
2. *Right of beneficiary to pursue trust funds invested in other property; character of the trust.*—Where a *cestui que trust* seeks to pursue trust funds invested by the trustee in land or other property, and title taken in his own name, or in the name of a stranger with notice, it is wholly immaterial whether the money was paid at the time of the purchase or afterwards. This is not technically or strictly a resulting trust, but a trust created by law, originating in the right of the *cestui que trust* to pursue the trust fund, through its various transmutations, into a new investment made in violation of the trustee's duties. *Whaley v. Whaley*, 159.
3. *Resulting trust; money must be paid at time of purchase.*—Where no question arises as to misappropriation of trust funds, but money or property without fiduciary ear-marks is paid or invested by one person, and the title is taken in the name of another, the money must be paid or the property re-invested at the time of the purchase, in order to create a resulting trust. *Ib.* 159.
4. *Same; does not exist where the money was loaned.*—If one person advances the purchase-money of property by way of a loan to the vendee, and conveyance of title is made to the latter, no trust will result in favor of the party advancing the money. In such case the very fact of a loan contradicts and rebuts the implication of a trust, which might otherwise be presumptively raised by law. *Ib.* 159.
5. *When mortgagee entitled to protection against, as a purchaser for value.*—A creditor, who accepts from his debtor a note payable at twelve months, for a debt past due, thereby releasing parties who were sureties on the debt, and also takes a mortgage on land to secure the note, is a purchaser for value, and, as such, is entitled to protection against a trust in favor of the debtor's wife, resulting from the fact that the land was purchased with moneys belonging to her as her statutory separate estate, of which the creditor had no notice. *Mobile Life Ins. Co. Randall*, 220.

See CONFEDERATE MONEY, 3, 4.

FRAUDS, STATUTE OF, 1-3.

GUARDIAN AND WARD.

HUSBAND AND WIFE, 12, 15, 20.

UNLAWFUL DETAINER.

1. *Character of action.*—Unlawful detainer is a possessory action, in which the only question involved is the plaintiff's right of possession to the premises sued for; an inquiry into "the estate or merits of the title" is expressly inhibited by statute. *Houston v. Farris & McCurdy*, 570.
2. *When defendant can not set up title adverse to his landlord in defense.* The plaintiff in an action of unlawful detainer, having derived title by purchase from a testator's sole devisee, the defendant, having entered under a lease from the plaintiff, can not defeat a recovery by showing that he had been appointed administrator of the estate of the testator under whom the plaintiff derived title, and that the latter owed debts at the time of his death, some of which were still outstanding and unpaid. *Ib.* 570.

USURY.

1. *Trespass*.—Usury is not available to the defendant in an action of trespass *de bonis asportatis* by a mortgagor against the mortgagee for seizing personal chattels conveyed by the mortgage, for the purpose of showing, in connection with evidence of partial payments, that the debt was paid, and the mortgage satisfied at the time of the seizure. *Burns v. Campbell*, 271.

VENDOR AND PURCHASER.

1. *When an agreement is res inter alios acta*.—Where an owner of a tract of land sold it on a credit, and the purchaser having failed to pay the purchase-money, by agreement between the parties, another was substituted as purchaser, who assumed the payment of the purchase-money and to whom a conveyance was afterwards made by the vendor, an agreement made between the first and second purchasers prior to the execution of the conveyance, that the second purchaser should be put in possession of the land at a given date, is, as to the vendor, *res inter alios acta*, and is not binding on him. *Cowley v. Shelby, Trustee*, 122.
2. *Payment of a debt as consideration of a deed; when sufficient*.—In a contest between a vendee and a judgment creditor of a vendor, it is immaterial whether a debt, the payment of which constituted the consideration of the deed, was contracted prior to, or contemporaneously with the execution of the deed, as, in either event, it is a valuable consideration, which, if adequate and free from fraud, will uphold the deed. *Pique, Manier & Hall v. Arendale*, 91.
3. *Vendor's lien; when does not pass with transfer of note*.—Prior to the act of February 13th, 1879 (Pamphlet Acts, 1878-79, p. 171), the transfer of a promissory note, given for the purchase-money of land, by delivery merely, did not carry with it the right to enforce the vendor's lien on the land. *Prickett & Maddox v. Sibert, Adm'r*, 194.
4. *When mortgagee is a purchaser for value*.—A creditor, who accepts from his debtor a note payable at twelve months, for a debt past due, thereby releasing parties who were sureties on the debt, and also takes a mortgage on land to secure the note, is a purchaser for value, and as such, is entitled to protection against a trust in favor of the debtor's wife, resulting from the fact that the land was purchased with moneys belonging to her as her statutory separate estate, of which the creditor had no notice. *Mobile Life Ins. Co. v. Randall*, 220.

See CHANCERY, 32, 33.

DEEDS, 8, 9, 10.

HUSBAND AND WIFE, 12-15.

NOTICE.

WAREHOUSEMEN.

1. *Duty and liability*.—Warehousemen, being of the class of bailees known as paid agents, exercising private employments, their liability and relation are essentially different from those of common carriers; their duty is to bring to the business in which they are employed reasonable skill and diligence, and they are answerable only for ordinary negligence, and may, by special contract, enlarge or narrow their liability as defined by law, except for losses caused by or through their own fraud. *Seals v. Edmondson*, 509.
2. *Negligence imputed*.—The general rule is, that if a bailee of goods, liable only for losses occurring from his negligence, upon

WAREHOUSEMEN—*Continued.*

demand made, fails to re-deliver them, or does not account for a failure to make delivery, *prima facie*, negligence will be imputed to him; and the burden of proving a loss without the want of ordinary care is devolved upon him. *Ib.* 509.

3. *When burden of proof on bailor to show negligence.*—But where, as in this case, there is a full explanation of the failure to deliver on demand, and it is shown that the goods were lost by a cause not involving the bailee in liability, as by fire, the attending circumstances being known to the bailor before demand, and the demand being merely formal, it can not be presumed from the failure to deliver that the bailee has been wanting in care, or has been negligent, and his negligence was the proximate cause of the loss; and hence, upon the bailor, in a suit by him for damages resulting from the loss, rests the burden of offering some evidence tending to show that the defendant has been guilty of negligence, causing or contributing to the destruction of the goods. *Ib.* 509.
4. *Measure of duty and liability not affected by care taken of their own property similarly situated.*—The liability of a warehouseman, for the safe care and custody of goods intrusted to his keeping, is not determined by the degree of care and diligence which he in fact bestows on his own goods similarly situated. Whether he is very careless and indifferent about his own goods, or is very prudent and diligent, in either case, the measure of his duty is, to bestow reasonable skill and ordinary diligence in regard to the property intrusted to his custody, to do all that men of ordinary prudence would do under the circumstances. *Ib.* 509.
5. *What not admissible as evidence of negligence.*—In an action against a warehouseman to recover damages for cotton stored and destroyed by fire, it being shown that the warehouse, a brick structure without a roof, located in the city of Eufaula, was burned, with the cotton stored therein, on Christmas night, and that the city authorities had previously refused to prohibit the explosion of crackers and like fireworks on the streets during the Christmas holidays, the plaintiff, after proof of facts tending to show that the explosion of such fireworks caused the burning of the warehouse and cotton, offered evidence that the defendant owned about seven hundred and fifty bales of the cotton stored in the warehouse, which was insured, and that, on the day before the fire, he obtained additional insurance on his cotton for three days only,—*held*, that the offered evidence was irrelevant and inadmissible. *Ib.* 509.
6. *Same; usage as to employment of watchmen; when admissible.*—In such case, the particular want of diligence imputed to the defendant being the neglect on his part to employ a watchman to guard against the danger of fire in the night time, and especially during the nights when fireworks were exploded on the streets, evidence that the warehouse had been used for the storage of cotton for many years by a former owner, and that during the time of such use fireworks had been exploded in the streets, and a watchman had not been employed to guard or protect it, is competent, as tending to show that the defendant had exercised common or ordinary diligence. *Ib.* 509.

WITNESS.

1. *Conviction of infamous crime renders incompetent.*—At common law, persons convicted of a crime which rendered them infamous, such as treason, felony and *crimen falsi*, were incompetent to testify as witnesses; and, in the absence of statutory provisions changing

WITNESS—Continued.

- the common law, that rule prevails in this State. *Sylvester v. State*, 17.
2. *Conviction of petit larceny renders incompetent.*—A conviction of petit larceny renders a witness infamous, and, therefore, incompetent to testify. *Sylvester v. State*, 17; *Burns v. Campbell*, 271.
 3. *Conviction before mayor of Selma for violation of ordinance against larceny, does not render incompetent.*—A conviction of a person before the mayor of the city of Selma for a violation of an ordinance of the city against larceny, does not render him infamous and incompetent as a witness; and such mayor having, under the charter of that city, the jurisdiction of a justice of the peace, in criminal cases, and it not appearing whether such person was convicted by the mayor, sitting *ex officio* as a justice of the peace, of an offense against the State, or whether he was convicted merely of the violation of a municipal ordinance, evidence of such conviction was properly excluded from the jury. *Burns v. Campbell*, 271.
 4. *Husband and wife; competency as witnesses for each other.*—In civil cases, husband and wife are competent witnesses for each other, to prove any fact that did not come to their knowledge through the channel of the conjugal relation, or which is manifestly not confidential. This embraces all matters which must have been intended by them to be made public, and the disclosure of which would not be a violation of marital confidence, or tend to engender matrimonial discord. *Gordon, Rankin & Co. v. Tweedy*, 202.
 5. *Competency of, as witnesses for or against each other.*—It must be regarded as settled, that when, in any case, husband and wife are competent witnesses against each other, they are also competent witnesses for each other. *Tucker v. State*, 342.
 6. *Same; when wife competent witness for husband in criminal case.* On the trial of the husband for an assault and battery on his wife, she is a competent witness for him. *Ib.* 342.
 7. *When incompetent.*—On the settlement of the accounts of an administrator in chief, after a declaration of insolvency, with the administrator *de bonis non*, a creditor of the estate, being interested in the trust fund represented by the administrator *de bonis non*, though not a party to the record, is not a competent witness for the latter to prove a transaction with the deceased, which would tend to increase the liability of the administrator in chief. *Dunlap, Adm'r v. Mobley, Adm'r*, 102.
 8. *In action by administrator, defendant may be called by him to testify as to transactions with his intestate.*—While in an action brought by an administrator the defendant is, under the statute, incompetent to testify in his own behalf as to any transaction with, or statement by the plaintiff's intestate, he may be called as a witness by, and be compelled to testify in favor of, the plaintiff as to such transaction or statement. *Dudley, Adm'r, v. Steele*, 423.
 9. As to competency on question of insanity, see CRIMINAL LAW, 20-22.

See CRIMINAL LAW, sub-title, STATEMENT BY DEFENDANT.





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